

No. 10665

United States
Circuit Court of Appeals
For the Ninth Circuit.

A. T. MARTIN and ALICE M. MARTIN,
Appellants,

VS.

CHARLOTTE L. SHEELY, JOHN H. SHEELY,
JOE A. SHEELY and ROSS L. SHEELY,
Copartners,
Appellees.

Transcript of Record

Upon Appeal from the District Court For the Territory of
Alaska, Third Division

FILED.

MAR 10 1944

PAUL B. O'BRIEN,
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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*Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court for the Territory of Alaska,
Third Division

No. A-2827

CHARLOTTE L. SHEELY, JOHN H. SHEELY,
JOE A. SHEELY, and ROSS L. SHEELY,
Plaintiffs,

vs.

A. T. MARTIN and ALICE M. MARTIN,
Defendants.

COMPLAINT

Come now the plaintiffs above-named and for a first cause of action against defendants allege as follows:

I.

That during the month of June, 1941, the plaintiffs and defendants entered into oral negotiations for the purchase by the plaintiffs from the defendants, and the sale by the defendants to the plaintiffs, of the personal property comprising the whole of that certain dairy and milk distribution business conducted by the defendants under the trade name and style of "Step-And-Half-Ranch", and for the leasing of the land and premises used by the defendants for the conduct of the said business to the plaintiffs.

II.

That, as a result of the said oral negotiations, the plaintiffs, Charlotte L. Sheely, John H. Sheely, and Joe A. Sheely, with the defendants, entered into a "Conditional Sales Agreement", a "Lease", and a

"Grazing Permit", true and correct copies of which said instruments are hereto attached, marked Exhibits "A", "B", and "C", respectively, and by this reference made a part hereof the same as though set out herein in full, and that each of the said instruments was and is an integral part of the whole transaction, neither being acceptable to the plaintiffs without the others. [2]

III.

That by the terms of the said conditional sales agreement, the defendants agreed to sell to the plaintiffs, and the plaintiffs agreed to purchase of and from the defendants, the whole of that certain dairy and milk distribution business being then conducted by the defendants under the trade name and style of Step-And-Half Ranch, save and except the accounts receivable, but including the livestock, furniture and fixtures, farming implements and tools and motive equipment, all of which said property is set out in the inventory attached to the said conditional sales agreement, "Exhibit A", at and for the purchase price of Twenty-Eight Thousand Two Hundred Ninety-four Dollars (\$28,294.00), payable \$9800.00 upon the execution of the agreement, and \$308.22 on the 10th day of August, 1941, and \$308.22 on the 10th day of each month thereafter until the purchase price should be paid in full, with interest at the rate of 6% per annum from July 1st, 1941, until paid.

IV.

That the chief item contained in the inventory of property attached to the conditional sales agree-

ment, "Exhibit A", was fifty-six head of cows; that said cows were figured by the parties at Three Hundred Dollars (\$300.00) per head, which accounted for \$16,800.00 of the total purchase price of \$28,294.00; that the defendants warranted that they were the lawful owners of the said cows and had the full right, power and authority to sell the same.

V.

That the plaintiffs, Charlotte L. Sheely, John H. Sheely, and Joe A. Sheely, on the 28th day of June, 1941, relying upon the representations of the defendants, entered into the said conditional sales agreement, "Exhibit A", executed the said lease "Exhibit B", and signed the said grazing permit, "Exhibit C", and paid to the defendants the sum of \$9,800.00 on account of the purchase price of the property described in the said conditional sales agreement, \$200.00 on account of the said lease, and \$110.00 on account of the said grazing permit, and thereafter on or about July 1st, 1941, [3] entered into possession of the property and premises described in the said instruments.

VI.

That on the 28th day of June, 1941, at the insistence of the defendants, the plaintiff, Ross L. Sheely, did in writing guarantee the performance by the plaintiffs, Charlotte L. Sheely, John H. Sheely, and Joe A. Sheely, of the said conditional sales agreement and lease, a true and correct copy of which said guaranty is hereto attached, marked

“Exhibit D”, and by this reference made a part hereof the same as though set out herein in full.

VII.

That the plaintiffs have performed to date the terms and conditions of the said conditional sales agreement, lease, grazing permit, and guaranty, and, in addition to the payments alleged in Paragraph V, above, have paid to the defendants upon the said Conditional Sales agreement “Exhibit A”, the sum of \$1541.10 and \$450.00 interest, and upon the said lease, “Exhibit B”, the sum of \$1000.00, and have paid to the defendants the sum of \$550.00 for their equity in a truck being purchased by the defendants from Wells Motor Company, Inc., of Anchorage, Alaska, and have paid to defendants the sum of \$2000.00 for hay and grain which the defendants had on order at the time of the execution of the conditional sales agreement, and as in said conditional sales agreement provided, and have purchased additional equipment for the dairy and made improvements upon the premises at a cost of \$2513.00.

VIII.

That at the time of the execution of the said Conditional Sales Agreement, lease, grazing permit, and guaranty, and for a long time prior thereto, a large number of the cows sold to the plaintiffs and described in the said conditional sales contract were diseased and infected with Bang’s Disease or contagious abortion, which fact was well known to the defendants; and unknown to the plaintiffs; but,

notwithstanding such knowledge upon the part of the defendants, and with the intent to injure the plaintiffs, the defendants [4] sold and delivered the said cows to the plaintiffs and accepted from the plaintiffs a portion of the purchase price thereof as hereinabove alleged.

IX.

That since the 28th day of June, 1941, the date of the execution of the instruments hereinabove described, the plaintiffs have of necessity and because of the said disease, killed and disposed of eight of the cows purchased from the defendants and have received therefor the total sum of \$832.45, which amount the plaintiffs allege is approximately one-third of the value of clean, uninfected dairy cows.

X.

That all of the said cows were purchased by the plaintiffs as and for a dairy herd, which fact was well known to the defendants, and the said disease with which the said herd was and is infected renders the herd of little value for dairy purposes.

XI.

That the plaintiffs have suffered damages by reason of the wrongful acts and omissions of the defendants herein alleged, and will suffer irreparable damage if they are required to perform their agreements with the defendants, as herein described, and as hereto attached and marked "Exhibits A, B, C, and D."

XII.

That the plaintiffs have no plain, speedy, and adequate remedy at law.

And For a Second Cause of Action Against the Defendants, Plaintiffs Allege:

I.

That on the 28th day of June, 1941, and for a long time prior thereto, the plaintiffs owned a large dairy herd, and operated a dairy business near the town of Palmer, in the Third Judicial Division of the Territory of Alaska, and that the cows comprising the said dairy herd were free from the disease known as Bang's Disease, or contagious abortion. [5]

II.

That on the said date, and for a long time prior thereto, the defendants owned a large herd of cows, and operated a dairy business near the town of Anchorage, in the Third Judicial Division of the Territory of Alaska.

III.

That on the said date, and for a long time prior thereto, the dairy herd of the defendants was infected with the said disease known as Bang's Disease, or contagious abortion, which fact was well known to the defendants, and unknown to the plaintiffs.

IV.

That on the 28th day of June, 1941, in violation of law, the defendants, without disclosing to the plaintiffs the fact that the said herd was diseased,

sold to the plaintiffs fifty-six cows and one bull comprising the entire dairy herd of the defendants, and warranted that they had full right, power, and authority to sell the same.

VI.

That the plaintiffs, not knowing that the cows which they purchased from the defendants were infected with Bang's Disease, intermingled said cows with those of their own herd, and, as a result, thereof, their own dairy herd has become infected with the said disease, all to their damage in the sum of \$10,000.00.

Wherefore, plaintiffs pray:

1. That the Conditional Sales Agreement, "Exhibit A", described in plaintiffs first cause of action be by this court decreed illegal and void;

2. That the lease, "Exhibit B", the Grazing Permit, "Exhibit C", and the Guaranty, "Exhibit D", be rescinded, cancelled, and declared void as being part of the same transaction and based upon and supported by the illegal agreement, "Exhibit A";

3. That the plaintiffs have judgment against the defendants, and each of them, for the sum of \$16,163.10 on account of their first [6] cause of action;

4. That the plaintiffs have judgment against the defendants, and each of them, for the sum of \$10,000.00 on account of their second cause of action;

5. That plaintiffs have such other and further

relief, as to the court may seem just and equitable in the premises;

6. That plaintiffs have judgment for their costs.

7. That the defendants be restrained and enjoined during the pendency of this cause from exercising any of the remedies provided for the defendants by the said conditional sales agreement, lease, grazing permit, and guaranty in the event of default by the plaintiffs.

W. N. CUDDY

Attorney for the plaintiffs [7]

United States of America

Territory of Alaska—ss.

Ross L. Sheely and Charlotte L. Sheely being first duly sworn on oath, depose and say:

That I am one of the plaintiffs named in the foregoing complaint which I have read and know the contents thereof, and that the statements and allegations therein contained are true as I verily believe.

ROSS L. SHEELY

CHARLOTTE L. SHEELY

Subscribed and sworn to before me this 27th day of December, 1941.

[Seal] W. N. CUDDY

Notary Public in and for Alaska. My commission expires: 8/29/45. [8]

EXHIBIT "A"

(Copy)

CONDITIONAL SALES AGREEMENT

This Agreement, made and entered into this 26th day of June, 1941, by and between A. T. Martin and Alice M. Martin, husband and wife, of Anchorage, Alaska, hereinafter called the "sellers", Charlotte L. Sheely, John H. Sheely and Joe A. Sheely, of the same place, hereinafter called the "buyers",

WITNESSETH:

For and in consideration of the mutual covenants and agreements hereinafter set forth, it is agreed as follows:

First: The sellers agree to sell, and the buyers agree to purchase the following described personal property for the price and upon the terms herein set forth, to-wit:

The whole of that certain dairy and milk distribution business now being conducted by the sellers under the trade name and style of Step-and-Half Ranch, at and around Anchorage, Alaska, save and except the accounts receivable of the sellers, but including the livestock, furniture and fixtures, farming implements and tools and motive equipment that are set forth and particularly described in the hereto attached inventory marked Exhibit "A", which is by reference incorporated in and made a part of this description; and also including the good will of the sellers in and to said dairy and milk distribution business.

Exhibit "A"—(Continued)

for the sum of Twenty-Eight Thousand Two Hundred Ninety-Four Dollars (\$28,294.00), payable as follows: Nine Thousand Eight Hundred Dollars (\$9,800.00) in cash upon the execution of this agreement, the receipt of which is hereby acknowledged by the sellers, and the balance of Eighteen Thousand Four Hundred Ninety-Four Dollars (\$18,494.00) in lawful money of the United States at the rate of Three Hundred Eight & 22/100 Dollars (\$308.22) on the 10th day of August, 1941, and Three Hundred Eight & 22/100 Dollars (\$308.22) on the 10th day of each and every month thereafter until [9] the whole of said balance shall have been paid. Interest on the unpaid balance shall be paid monthly, commencing August 10, 1941, at the rate of Six Percent (6%) per annum from the first day of July, 1941, until paid. Provided, however, that the buyers shall have the option of anticipating any or all of said monthly deferred payments at any time that they may choose to do so.

Second: The buyers hereby agree to pay the full sum above specified, together with interest, at the times and in the manner herein set forth, but it is mutually understood and agreed that the buyers shall have a grace period of ten (10) days from and after the 10th day of each month within which to make the monthly payment with interest then due. All of such payments shall be made by paying the same to the credit of the sellers at the First National Bank of Anchorage, Alaska, or at such other place

Exhibit "A"—(Continued)

in Anchorage, Alaska, as may be designated in writing by the sellers.

Third: It is specifically agreed that title to said personal property is to remain with and be in the sellers until the buyers have performed all of the terms and conditions herein set forth. It is further understood and agreed that the buyers shall have possession of the property covered by this agreement on the 1st day of July, 1941, and shall continue in the possession thereof unless and until they shall default in any of the terms, conditions and covenants herein contained.

Fourth: It is agreed that provided the cows, the bull, the caterpillar tractor, ensilage cutter, manure spreader, mower and windrower and the 10-horse motor are properly marked for identification, they may be moved from the Anchorage Precinct to lands being farmed by the buyers in the Palmer Recording Precinct, but not otherwise. The buyers further specifically agree that they will not remove any of the other personal property from the lands being operated by them either under lease from the sellers or in connection with their milk dairy distribution business in the Anchorage Precinct, Territory of Alaska, without the written consent of the sellers. They further agree not to permit any other person or persons to have possession of any of the property sold hereby, without the written consent of the sellers. [10]

Fifth: The buyers further agree to be fully responsible and to remain bound for the full pur-

Exhibit "A"—(Continued)

chase price of the property covered by this agreement should the same become lost, damaged or destroyed by fire or otherwise.

Sixth: It is understood and expressly agreed that the buyers have inspected the property covered by this agreement and are familiar with the condition thereof and that the same is sold to the buyers without any warranties or representations of any kind or character whatsoever on the part of the sellers, save and except that the sellers warrant and agree that they are the lawful owners thereof and have full right, power and authority to sell and dispose of the same and that there are no existing liens or encumbrances against said property or any part or portion thereof.

Seventh: The sellers agree that the buyers may dispose of the increase from the dairy herd in such manner as they see fit, except that it is agreed that the herd shall be maintained in not less than the present numbers, during the life of this contract, and any replacements to the dairy herd shall be bound by all of the terms and conditions hereof. The buyers agree that they will keep and maintain the other personal property covered by this agreement in good repair during the life hereof.

Eighth: The buyers agree that during the life of this agreement they will pay all taxes, assessments or charges that may be levied or laid against or upon said property, when the same shall become due; and that they will not permit any mechanics' material men's or other liens of any kind or nature to become effective against the same.

Exhibit "A"—(Continued)

Ninth: It is understood that the sellers have on order grain and hay of an approximate landed cost of Two Thousand Dollars (\$2,000.00) and the buyers agree to pay to the sellers, on or before the 1st day of September, 1941, the cost landed price at [11] Anchorage, Alaska, for said grain and hay, over and above and in addition to the payments hereinbefore agreed to be made by the buyers; and the buyers further agree that they will take over and assume from the sellers the purchase contract for a truck of the approximate value of One Thousand Seven Hundred Dollars (\$1,700.00) being purchased from the Wells Motor Company of Anchorage, Alaska, and to pay to the sellers on or before the 1st day of September, 1941, the equity of the sellers in the purchase contract for said truck in the sum of Five Hundred Fifty Dollars (\$550.00); it being further understood and agreed that the present truck being used in the milk distribution business is to be turned in to the Wells Motor Company upon the arrival of the new truck, and the buyers may have the right to use the same until the arrival of said new truck, entirely at their own risk.

Tenth: The sellers agree to make available for the inspection of the buyers their records and accounts of the business conducted by them under the name and style of Step-And-Half Ranch.

Eleventh: The sellers further agree that they will not engage in the dairy or milk distribution

Exhibit "A"—(Continued)

business in the Anchorage Precinct, Territory of Alaska, for a period of ten (10) years from and after the 1st day of July, 1941, provided that the buyers do not default in the terms and conditions of this agreement or under the lease of the real estate from the buyers executed contemporaneously herewith.

Twelfth: It is understood and agreed that the buyers shall not assign this agreement without the written consent of the sellers first had and received and that they shall not mortgage, hypothecate or otherwise charge or encumber their rights or equities hereunder, and shall not permit said property to be attached, seized or levied upon under any process of any court of law.

Thirteenth: It is agreed that time shall be of the essence of this agreement and that, should the buyers default in any of the [12] payments, terms, conditions and covenants hereof, then and in any of such events the sellers may at their option immediately declare the entire balance due hereunder to be forthwith due and payable and may immediately retake possession of said property with or without process of law, and all payments theretofore made shall be retained by the sellers as rent and liquidated damages; but in no event shall the buyers be released from any of their obligations under this contract to pay the full purchase price for said property unless specifically so released by the sellers in writing or by operation of law in accordance with the provisions of the Conditional

Exhibit "A"—(Continued)

Sales Act as now in force and effect in the Territory of Alaska. It is further agreed that a waiver by the sellers of any of the terms or provisions hereof shall not be construed to be a waiver as to any subsequent violation or violations that may occur, nor shall it be construed to be a waiver with respect to payments being required on the due dates as herein set forth.

Fourteenth: Each and every clause, term, covenant, provision and condition of this agreement shall inure to the benefit of, descend to and become binding upon the heirs, executors, administrators and assigns of the respective parties hereto, subject to the restrictions as to assignment or alienation by the buyers as hereinabove set forth.

In Witness Whereof, the parties hereto have hereunto executed this agreement on the day and year first hereinabove written.

[Seal] A. T. MARTIN

[Seal] ALICE M. MARTIN

Sellers

[Seal] CHARLOTTE L. SHEELY

[Seal] JOHN H. SHEELY

[Seal] JOE A. SHEELY

Buyers

Witnesses:

THOMAS M. DONOHOE

W. N. CUDDY [13]

Exhibit "A"—(Continued)
(Copy)

United States of America

Territory of Alaska—ss.

This Is To Certify, that on this 28th day of June, 1941, before me, the undersigned, a notary public in and for the Territory of Alaska, duly commissioned and sworn, personally appeared A. T. Martin, Alice M. Martin, Charlotte L. Sheely, John H. Sheely and Joe A. Sheely, each to me personally known and to me known to be the individuals described in and who executed the foregoing instrument of writing, and each acknowledged to me that he/she signed and sealed the same freely and voluntarily for the uses and purposes therein mentioned.

In Witness Whereof, I have hereunto set my hand and affixed my official seal on the day and year in this certificate first above written.

[Seal] THOMAS M. DONOHOE

Notary Public for Alaska. My commission expires
Aug. 16, 1944. [14]

Exhibit A

56—Cows

1—Bull

1—Caterpillar

1—Ensilage Cutter

1—Breaking Plow

1—Three-bottom Plow

1—Grain Drill

1—Manure Spreader

Exhibit "A"—(Continued)

- 1—Disc Harrow
- 1—Spike
- 1—Spring Tooth Harrow
- 1—Hay Rake
- 1—Mower and Windrower
- 1—Motor 10-horse
- 1—Motor with Emery
- 1—Chain Hoist 1½ T.
- Milking Machines 3 U
- 1—Electric Heater
- 1—Dairy Scale
- 48—Salt Cups
- 25—Drinking Cups
- 1—Cow Sling
- 1—Wagon
- 1—Sled
- 1—Milk Cart
- 1—Boiler
- 1—Pasteurizer
- 1—Cooler
- Cooler Covers
- 1—Separator
- Bottle and capper
- 1—Tank
- Motor Pump and Pipe
- 1—Thermometer
- 1—Bottle Washer
- 1—Churn
- 1—Compressor for Milk M.
- 1—Pump
- 1—Pump

Exhibit "A"—(Continued)

1—Pump

Dollies Milk

18—Milk Cans 10-gal.

4—Milk Cans 5-gal.

10— " " 3-gal.

10— " " 2-gal.

10— " " 1-gal.

41—Bottle Crates qts.

12— " " pts.

100— " " $\frac{1}{2}$ pts.

8—Bottles qts.

" pts.

" $\frac{1}{2}$ pts. [15]

3—Beds and Mattresses

2—Wardrobes

1—Dresser

4—Chests of Drawers

1—Sewing Machine

1—Dining Table

8—Chairs

1—Cook Stove

1—Electric Heater

1—Cabinet

1—Filing Cabinet

1—Desk

1—Filing Cabinet

1—Typewriter

1— " Table

1—Adding Machine

1—Check Machine

1—End Table

Exhibit "A"—(Continued)

- 1—Davenport
- 2—Chairs
- 1—Chair
- 1—Table
- 1—Radio and Attachment
- 1—Radio Table
- Cooking Utensils
- Dishes and Silver
- Bunk House
- 2—Double Deck Beds
- 2—Cots and Mattresses
- 1—Heater
- 2—Chairs
- 3—Chairs
- 5—Blankets—wool
- 12— " —cotton
- Seed and Fertilizer
- Planting and Manure
- 1—bbl. Wyandotte C.C.
- 3—Drums Lime
- 8—Cartons Discs
- 2—8-place Carriers
- 3—6 " "
- 500—Paper Bottles qts.
- 200— " " pts.
- 300— " " 1½ pts.
- 40—c/s qt. bottles
- 10— " pt. "
- 35— " 1½-pt. " [16]

EXHIBIT B

(Copy)

LEASE

This Indenture, made and entered into this 26th day of June, 1941, by and between A. T. Martin and Alice M. Martin, husband and wife, of Anchorage, Alaska, hereinafter called the "lessors", Charlotte L. Sheely, John H. Sheely, and Joe A. Sheely, of the same place, hereinafter called the "lessees",

WITNESSETH:

For and in consideration of the mutual covenants and agreements hereinafter set forth it is agreed as follows:

The lessors do hereby lease, let and demise unto the lessees, the following described premises and property, to-wit:

The North Three Hundred Sixty (360) feet of Tract Number Twenty-seven (27) and of Tract Number Twenty-eight (28) of United States Survey Number 1456, Fourth Addition to Anchorage Townsite in T. 13 N., R. 3 W., Seward Meridian, Anchorage Precinct, Territory of Alaska, according to the official map and plat thereof now of record in the office of the United States Commissioner and ex-officio recorder for the Anchorage Precinct; with the appurtenances,

for a term of ten (10) years commencing with the 1st day of July, 1941, and ending with the 30th day

of June, 1951, at the monthly rental of the sum of Two Hundred Dollars (\$200.00) per month.

All rentals shall be payable in lawful money of the United States of America in advance on the first day of each and every month during said term, by depositing the same to the creditor of the lessors at the First National Bank, Anchorage, Alaska, or to such other agent of the lessors at Anchorage, Alaska, that they may designate in writing. The lessors hereby acknowledge the receipt of the sum of Two Hundred Dollars (\$200.00) in payment of the rental for the month of July, 1941.

The lessees and each of them hereby covenant and agree to pay the entire rent for the full term of this lease to the [17] lessors at the times and in the manner herein specified. It is agreed that default in the payment of rentals for a period of ten (10) days after the same shall become due, shall work a forfeiture of this lease at the option of the lessors.

It is expressly understood and agreed that the leased premises shall be used for dairy purposes and for no other purpose without the written consent of the lessors first had and received.

The lessees hereby covenant and agree not to use the premises herein leased or to permit them to be used for any purpose that will increase the rate of fire insurance on the buildings situated thereon, over the rate ordinarily charged; and that they will not install or permit to be installed any apparatus that will cause a higher rate of fire insurance than is now charged and will not keep or per-

mit to be kept or maintained any apparatus or thing prohibited by the rules or regulations of the regular fire insurance companies. The lessees further agree that in the occupancy and use of the said leased premises they will comply with all of the laws of the Territory of Alaska and of the United States of America, and will not use or permit said premises to be used for any unlawful purpose or purposes.

The lessees are hereby granted permission to erect upon the leased premises any buildings or structures that they may desire for use in conducting a dairy or dairy business, and it is agreed that they may remove the same at the expiration of this lease or prior thereto if they are not in default in any of the terms and conditions herein set forth. Provided, however, that before removing the same they shall give notice thereof to the lessors in writing for a period of at least fifteen (15) days, and the lessors shall have the option within said fifteen (15) day period, of purchasing said buildings or structures at the cost price to the lessees. It is further agreed that if they should [18] remove any such buildings or structures, they shall restore the land to its original condition. The lessees further covenant and agree that during the term of this lease they will maintain the buildings and structures now situated upon the leased premises in as good a condition as they now are, reasonable wear and tear and damage by fire excepted.

The lessees agree not to permit any material men's, mechanics' or other liens of any kind or

nature, or charges or assessments to become effective against said leased premises or property during the term of this lease; and they further agree that the lessors may post notices of non-liability against any material men's or laborers' liens and that the lessees will keep and maintain said notices posted during the life hereof.

It is understood and agreed that this lease is made subject to an easement which has been granted by the lessors to the City of Anchorage, Alaska, for a water pipe through the land covered hereby.

It is understood and agreed that the lessees shall not assign this lease or sub-let or under-let the whole or any part or portion of the premises covered hereby, without first obtaining the written consent of the lessors.

The lessors do hereby covenant that upon the payment of the rentals and the performance of all of the agreements and conditions hereof by said lessees to be paid and performed as herein set forth, said lessees shall peaceably and quietly hold and enjoy the above described premises during the full term herein specified.

It is further covenanted and agreed that if default be made in the payment of the rentals as above specified or in the keeping of any of the agreements herein agreed to be kept by the lessees, then it shall be lawful for the said lessors at their [19] option to terminate this lease; to re-enter upon said premises and property and to remove all per-

sons therefrom; but the exercise of such option shall not be construed to release the lessees from any covenants and agreements herein contained, including damages for the non-payment of rentals as herein specified. The lessees further agree that at the expiration of the term of this lease either by lapse of time or by forfeiture as above specified, they will quit and surrender said premises quietly and peaceably to the lessors.

It is understood that should the lessors fail to exercise their option to terminate this lease because of the failure to pay rent when due or because of the failure to comply with some or one of the other covenants herein contained, this shall not be construed to be a waiver of the right of the lessors to terminate the same at their option for any future default or defaults that may occur.

Time shall be of the essence of this lease; and it is also agreed that the same shall inure to the benefit of, descend to and become binding upon the heirs, executors, administrators and assigns of the respective parties hereto, and the lessees do hereby bind themselves jointly and severally that they will keep and perform all of the covenants and conditions hereof, including the payment of the rentals herein specified.

In Witness Whereof, the parties hereto have caused this indenture to be duly executed on the day and year first hereinabove written.

[Seal] A. T. MARTIN

[Seal] ALICE M. MARTIN

Lessors

[Seal] CHARLOTTE L. SHEELY

[Seal] JOHN H. SHEELY

[Seal] JOE A. SHEELY

Lessees

Witnesses:

THOMAS M. DONOHUE

W. N. CUDDY [20]

United States of America

Territory of Alaska—ss.

This Is To Certify, that on this 28th day of June, 1941, before me, the undersigned, a notary public in and for the Territory of Alaska, duly commissioned and sworn, personally appeared A. T. Martin, Alice M. Martin, Charlotte L. Sheely, John H. Sheely and Joe A. Sheely, each to me personally known and to me known to be the individuals described in and who executed the foregoing instrument of writing, and each acknowledged to me that he/she signed and sealed the same freely and voluntarily for the uses and purposes therein mentioned.

In Witness Whereof, I have hereunto set my hand and affixed my official seal on the day and year first above written.

[Seal] THOMAS M. DONOHUE

Notary Public for Alaska. My commission expires
August 16, 1944. [21]

EXHIBIT "C"

(Copy)

GRAZING PERMIT

Whereas, Asa T. Martin holds a lease on school lands from the Territory of Alaska covering Lots 2, 3, and 4, Sec. 16, Twp. 13 N., R. 3 W., Seward Meridian, Anchorage Precinct, and also the SW $\frac{1}{4}$ of the NW $\frac{1}{2}$, SE $\frac{1}{4}$ of the NW $\frac{1}{4}$, and the SW $\frac{1}{4}$ of the NE $\frac{1}{4}$ of Sec. 16, 13 N., 3 W., Seward Meridian dated March 20th, 1935; and has applied to the Governor of the Territory for a new lease to last for a period of ten years; and

Whereas, the said Asa T. Martin is this day selling to Charlotte L. Sheely, John N. Sheely and Joe A. Sheely his milk and dairy distribution business of Anchorage, Alaska, and is leasing to said persons a tract of land for a period of ten years commencing with July 1, 1941, adjacent to the school lands above mentioned.

Now, Therefore, in consideration of the premises it is agreed by the said Asa T. Martin that the said Charlotte L. Sheely, John H. Sheely and Joe A. Sheely may use the said school lands leased by him as aforesaid for dairy purposes for such period of time as the lease mentioned above is not in default, and subject to the conditions as to use set forth in the lease from the Territory to the said Asa T. Martin.

The said Charlotte L. Sheely, John H. Sheely and Joe A. Sheely agree to pay to the said Asa T.

Martin the sum of \$110.00 per year payable on the due dates specified in the said Territorial lease.

Dated at Anchorage, Alaska, this 28th day of June, 1941.

A. T. MARTIN
CHARLOTTE L. SHEELY
JOHN H. SHEELY
JOE A. SHEELY

Witnesses:

THOMAS M. DONOHUE
W. N. CUDDY [22]

EXHIBIT "D"

(Copy)

GUARANTY OF PERFORMANCE OF CONTRACT

This Guaranty made this 28th day of June, 1941, by the undersigned Ross L. Sheely, of Anchorage, Alaska, Witnesseth:

Whereas, Charlotte L. Sheely, John H. Sheely and Joe A. Sheely have entered into a certain Conditional Sales Agreement bearing date the 26th day of June, 1941 with A. T. Martin and Alice M. Martin for the purchase of that certain dairy and milk distribution business known as Step-and-Half Ranch for the sum of \$28,294.00; and

Whereas, the said Charlotte L. Sheely, John H. Sheely and Joe A. Sheely are the lessees named in that certain lease bearing date the 26th day of June, 1941, wherein A. T. Martin and Alice M. Martin are named as the lessors;

Now, Therefore, for and in consideration of the sum of One Dollar (\$1.00) to me in hand paid by the said A. T. Martin and Alice M. Martin, the receipt whereof is hereby acknowledged, I do hereby guarantee, promise, and agree to and with them, that the above-named Charlotte L. Sheely, John H. Sheely and Joe A. Sheely will well and faithfully perform and fulfill everything by the hereinabove described Conditional Sales Agreement and Lease on their part and behalf to be performed and fulfilled, at the times and in the manner provided therein. And I do hereby expressly waive and dispense with any demand upon the said Charlotte L. Sheely, John H. Sheely, and Joe A. Sheely, and any notice of any nonperformance on their part.

In Witness Whereof, I have hereunto set my hand and seal this 28th day of June, 1941.

[Seal] ROSS L. SHEELY

In the presence of:

THOMAS M. DONOHOE

W. N. CUDDY

Service accepted this 13th day of May, 1942.

.....

Attorney for A. T. Martin and
Alice M. Martin.

[Endorsed]: Filed May 13, 1942. [23]

[Title of District Court and Cause.]

DEMURRER

Come now the defendants above-named and demur to the complaint of the plaintiffs in the above-entitled action upon the following grounds, to-wit:

1. That the first cause of action thereof does not state facts sufficient to constitute a cause of action.
2. That the second cause of action thereof does not state facts sufficient to constitute a cause of action.
3. That several cause of action have been improperly united.

THOMAS M. DONOHOE,
Attorney for Defendants.

Service of the Foregoing Demurrer By Receipt
of Copy Thereof Acknowledged on This
W. N. CUDDY,
Attorney for the Pltfs.

[Endorsed]: Filed May 21, 1942. [24]

[Title of District Court and Cause.]

MINUTE ORDER OVERRULING DEMURRER

Now at this time, the above-entitled cause having heretofore come on for hearing on defendants' Demurrer to plaintiffs' Complaint on the 12th day of June, 1942, the Court having granted counsel ten days to submit briefs, and the Court being fully and duly advised in the premises,

It Is Ordered that defendants' Demurrer be, and the same hereby is, overruled, and an exception granted defendants. [25]

[Title of District Court and Cause.]

ANSWER

Come now the defendants above-named and for answer to the complaint of the above-named plaintiffs admit, deny and allege as follows, to-wit:

I, II, III.

Referring to paragraphs I, II and III to plaintiffs' complaint, defendants admit the same.

IV.

Referring to paragraph IV of plaintiffs' complaint defendants admit the same except that defendants deny that there was any segregation of value for the cows or any other item embodied in said conditional sales contract, "Exhibit A".

V.

Referring to paragraph V of plaintiffs' complaint defendants admit the same except that defendants deny that said plaintiffs relied upon the representations of the defendants.

VI.

Referring to paragraph VI of plaintiffs' complaint defendants admit that plaintiff Ross L. Sheely guaranteed the performance of the other

plaintiffs; deny that he did this at the insistence of the defendants; and allege that this method of handling the transfer of the business from defendants to plaintiffs was proposed by the said Ross L. Sheely because he did not wish to appear directly as a purchaser in view of prior commitments to the Matanuska Valley Farmers Cooperating Association. [26]

VII.

Referring to paragraph VII of plaintiffs' complaint defendants specifically deny that the plaintiffs have performed to the date of said complaint the terms and conditions of the said conditional sales agreement, lease, grazing permit, and guaranty; deny that plaintiffs have purchased additional equipment for the dairy and made improvements upon the premises at a cost of \$2513.00 or any other sum; admit that plaintiffs made the payments in said paragraph specified; and specifically allege the said plaintiffs did not make any of the payments specifically required to be made by the terms of said conditional sales contract, lease and guarantee subsequent to the month of December, 1941, and were and are in default by reason of such non-payments.

VIII.

Referring to paragraph VIII of plaintiffs' complaint defendants deny the same and each and every allegation therein contained.

IX.

Referring to paragraph IX of plaintiffs' complaint defendants admit that plaintiffs have killed

and disposed of the cows therein mentioned but defendants deny that the same were killed or disposed of by necessity and because of said disease.

X.

Referring to paragraph X of plaintiffs' complaint defendants admit that said cows were purchased for a dairy herd and defendants deny each and every other allegation in said paragraph contained.

XI and XII.

Referring to paragraphs XI and XII of plaintiffs' complaint defendants deny the same and each and every allegation in said paragraphs contained.

[27]

And for Answer to Plaintiffs' Second Cause of Action Defendants Admit, Deny and Allege as Follows:

I.

Referring to paragraph I of plaintiffs' second cause of action defendants admit that plaintiffs owned a dairy herd near Palmer, Alaska, and defendants deny each and every other allegation in said paragraph contained.

II.

Referring to paragraph II of plaintiffs' second cause of action defendants admit the same.

III.

Referring to paragraph III of plaintiffs' second cause of action defendants deny the same and each and every allegation therein contained.

IV.

Referring to paragraph IV of plaintiffs' second cause of action defendants admit that they sold to plaintiffs fifty-six cows and one bull on the 28th day of June, 1941, and warranted that they had right to sell the same; and defendants deny each and every other allegation in said paragraph contained.

V.

Referring to paragraph V (marked VI) of plaintiffs' second cause of action defendants deny the same and each and every allegation therein contained.

And By Way of First Counter-Claim and First Cross-Complaint Defendants Allege as Follows:

I.

That on the 28th day of June, 1941, the defendants at the special instance and request of the plaintiffs sold to the plaintiffs in accordance with the terms and conditions of a certain written conditional sales agreement, a true copy of which is hereto attached, Marked Exhibit 1, and by reference incorporated in and [28] made a part hereof, that certain dairy and milk distribution business then being conducted at and about Anchorage, Alaska, under the trade name and style of Step-and-Half Ranch, and including certain personal property as in said conditional sale contract described, for the sum of \$28,294.00; \$9,800.00 down, \$308.22 on the 10th day of August, 1941, and \$308.22 on the 10th day of each month thereafter until the whole of

the balance shall have been paid with interest on the balance at a rate of 6% per annum from July 1st, 1941, payable monthly.

II.

That on said 28th day of June, 1941, for a valuable consideration, plaintiff Ross L. Sheely did in writing guarantee the payments as above specified and did guarantee the performance of the terms and conditions of said conditional sales contract by the remaining plaintiffs in this action. That hereto attached, marked exhibit 4, and by reference incorporated in and made a part hereof, is a full, true and correct copy of said guarantee.

III.

That said conditional sales agreement by its terms provides that the plaintiffs shall have a grace period of ten days within which to make the monthly payment with interest then due but that other than that time shall be of the essence of said agreement and that should the buyers default in any of the payments, terms, conditions and covenants of said agreement then the sellers, defendants herein, may at their option declare the entire balance forthwith due and payable. That said agreement by its terms further provides that plaintiffs, buyers therein, shall not permit any other person or persons to have possession of any of the property covered by the same without the written consent of the sellers, defendants herein.

IV.

That the plaintiffs have defaulted in the terms and [29] conditions of said conditional sales contract in the following particulars, to-wit:

(1) That said plaintiffs have failed, neglected and refused to make the monthly payment of \$308.22, together with interest on the balance due under said contract, due on the 10th day of January, 1942, within the time limited by said conditional sales contract or at all; and that said plaintiffs have failed, neglected and refused to make the monthly payments of principal and interest due each month since January, 1942, within the time allowed by said contract or at all.

(2) That contrary to the terms and provisions of said conditional sales contract the plaintiffs have permitted other persons to have the possession and control of personal property covered thereby without first obtaining the written consent of the defendants, specifically, the caterpillar tractor covered thereby.

(3) That contrary to the terms and provisions of said conditional sales contract the plaintiffs have not maintained the dairy herd in number equivalent to that at the time of said sale.

V.

That in accordance with the terms of said conditional sales contract the defendants have elected, and do hereby elect, because of the default of the plaintiffs in making the payments as in said contract provided for and in otherwise defaulting in

the performance of the terms, conditions and covenants of said contract to declare the entire unpaid balance of principal and interest due under said contract immediately due and payable. That said plaintiffs paid to defendants the sum of \$1541.10, and no more, upon the unpaid balance of principal of \$18,494.00 as in said contract provided; together with interest at 6% per annum from July 1, 1941, to December 10th, 1941, on said unpaid balance; and that by reason thereof there is now due, owing and unpaid to [30] defendants from plaintiffs the sum of \$16,952.90, together with interest at the rate of 6% per annum from December 10th, 1941, and although defendants have made demand upon plaintiffs for the payment thereof plaintiffs have wholly failed, neglected and refused to pay the same or any part or portion thereof.

And for a Second Counter-Claim and Second Cross-Complaint Defendants Allege as Follows:

I.

That on the 28th day of June, 1941, the defendants at the special instance and request of the plaintiffs leased and let to said plaintiffs certain real property situated in the Anchorage Precinct, Territory of Alaska, for a term of ten years commencing with July 1st, 1941, and ending June 30th, 1951, at the monthly rental of \$200.00 per month, payable monthly in advance on the first day of each and every month during said term. That hereto attached and marked Exhibit 2 is a full, true, and

correct copy of said lease, and the same is by reference incorporated in and made a part hereof.

II.

That on said 28th day of June, 1941, for a valuable consideration, plaintiff Ross L. Sheely did in writing guarantee the payment of rentals as above specified and did guarantee the performance of the terms and conditions of said lease by the remaining plaintiffs in this action. That hereto attached, marked Exhibit 4, and by reference incorporated in and made a part hereof is a full, true and correct copy of said guarantee.

III.

That the plaintiffs have paid to defendants the rentals for the months of July, August, September, October, November and December, 1941, and no more, and plaintiffs have wholly failed, neglected and refused to pay to defendants the rentals for the months January to October, both inclusive, 1942, and by reason thereof there is now due, owing and unpaid to [31] defendants from plaintiffs the sum of \$2,000.00, together with interest at 6% per annum on each monthly payment of \$200.00 thereof.

IV.

That under the terms and conditions of said lease the defendants are entitled to the immediate possession of said leased premises because of the default in the payment of the rentals as therein specified and as above set forth, and so elect to obtain the same.

And for a Third Counter-Claim and Third Cross-Complaint Defendants Allege as Follows:

I.

That on the 28th day of June, 1941, the defendants at the special instance and request of the plaintiffs, granted to said plaintiffs a grazing permit for certain lands then and now leased by defendants from the Territory of Alaska and situated in Anchorage Precinct, Territory of Alaska, upon the payment to the defendants of an annual rental of \$110.00. That hereto attached, marked Exhibit 3, and by reference incorporated in and made a part hereof is a full, true and correct copy of said grazing permit.

II.

That by the terms of said grazing permit said annual rental was due to defendants at the date of the lease between defendants and said Territory of Alaska, to-wit: August 19th. The said plaintiffs have wholly failed, neglected and refused to pay to defendants said sum of \$110.00 so due to them on the 19th day of August, 1942, or any part or portion thereof, and by reason thereof said plaintiffs are in default. That said grazing permit further provides that the same shall terminate in the event of a default by the plaintiffs in the performance of that certain lease dated June 28th, 1941, a true copy of which is hereto attached, marked Exhibit 2, and by reference incorporated [32] in and made a part hereof. That the plaintiffs have defaulted in the terms of said lease as hereinabove set forth in defendants' Second Coun-

ter-Claim and Second Cross-Complaint to which reference is hereby made for all of the particulars therein contained.

III.

That by reason thereof the defendants are entitled to the immediate possession of the premises described in said grazing permit and the cancellation thereof.

Wherefore defendants having fully answered plaintiff's complaint pray that plaintiffs take nothing by reason thereof and that the same be dismissed and that defendants have judgment against said plaintiffs and each of them as follows:

1. On defendants' first counter-claim and first cross-complaint for the sum of \$16,952.90, together with interest at the rate of 6% per annum from December 10th, 1941;

2. On defendants' second counter-claim and second cross-complaint for the sum of \$2,000.00, together with interest at 6% per annum on each monthly payment of \$200.00 thereof commencing with January 1st, 1942; that defendants have immediate possession of the premises and property mentioned and described in the lease set forth in said counter-claim and cross-complaint;

3. On defendants' third counter-claim and third cross-complaint that defendants have immediate possession of the premises and property mentioned and described in the grazing permit set forth in said counter-claim and cross-complaint and that the same be cancelled.

4. For defendants' costs and disbursements in this action incurred.

JOHN E. MANDERS,
THOMAS M. DONOHUE,
Attorneys for Defendants.

[33]

United States of America

Territory of Alaska—ss.

Asa T. Martin, being first duly sworn, upon his oath says:

I am one of the defendants named in the foregoing answer and cross-complaint and make this affidavit of verification for and on behalf of said defendants; that I have read the same, know the contents thereof, and that the same is true as I verily believe.

ASA T. MARTIN.

Subscribed and sworn to before me this 2d day of November, 1942.

[Seal] THOMAS M. DONOHUE,
Notary Public for Alaska. My commission expires
Aug. 16, 1944.

Service of the Foregoing Answer by Receipt of Copy Thereof Acknowledged on This 2d day of Nov. 1942.

W. N. CUDDY,
Attorney for the Pltfs. [34]

EXHIBIT "1"

[Printer's Note: Exhibit "1" is not reproduced here, as it is the same as Exhibit "A" attached to the Complaint, and printed in full, starting at page 10 of this printed record.]

EXHIBIT "2"

[Printer's Note: Exhibit "2" is not reproduced here, as it is the same as Exhibit "B" attached to the Complaint, and printed in full, starting at page 21 of this printed record.]

EXHIBIT "3"

[Printer's Note: Exhibit "3" is not reproduced here, as it is the same as Exhibit "C" attached to the Complaint, and printed in full, starting at page 27 of this printed record.]

EXHIBIT "4"

[Printer's Note: Exhibit "4" is not reproduced here as it is the same as Exhibit "D" attached to the Complaint, and printed in full, starting at page 28 of this printed record.]

[Endorsed]: Filed Nov. 2, 1942.

[Title of District Court and Cause.]

MOTION FOR LEAVE TO AMEND
COMPLAINT

Come now the plaintiffs in the above-entitled action and move the Court for an order permitting plaintiffs to amend the complaint herein, in the particulars hereinafter set forth. This motion is based upon the records and files in the above-entitled action.

PROPOSED AMENDMENT

I.

That said complaint be amended by re-forming the title thereto by adding to the present title the words, "Co-partners."

II.

That other allegations in said complaint be amended to conform to the above proposed change in title.

W. N. CUDDY,

Of Attorneys for Pltffs.

ORDER .

This matter coming on before the above-entitled Court on motion of plaintiffs to amend the complaint as hereinabove stated, it is hereby

Ordered, that said complaint may be amended in accordance with the above motion.

Done by the Court at Anchorage, Alaska, this
18th day of December, 1942.

SIMON HELLENTHAL

District Judge [50]

Objected to an exception allowed deft.

S. HELLENTHAL

District Judge

[Endorsed]: Filed Dec. 18, 1942. [51]

[Title of District Court and Cause.]

MINUTE ORDER GRANTING LEAVE TO
MOVE AGAINST CERTAIN PAPERS

Now at this time, on motion of Thomas M. Donohoe, Esq., of counsel for the defendants, W. N. Cuddy and George B. Grigsby, Esqs., counsel for plaintiffs, being present and consenting thereto,

It Is Ordered that defendants be, and they are hereby, granted leave to move against plaintiffs' amended complaint and reply when filed. [52]

In the District Court for the Territory of Alaska,
Third Division

No. A 2827

CHARLOTTE L. SHEELY, JOHN H. SHEELY,
JOE A. SHEELY, and ROSS L. SHEELY,
Copartners,

Plaintiffs,

vs.

A. T. MARTIN and ALICE M. MARTIN,

Defendants.

AMENDED COMPLAINT

Come now the plaintiffs above named and for a first cause of action against defendants allege as follows:

I.

That on the 28th day of June, 1941, the plaintiffs above named were copartners and engaged in the dairy business in the Anchorage Precinct of the Third Division of the Territory of Alaska.

II.

That during the month of June, 1941, the plaintiffs and defendants entered into oral negotiations for the purchase by the plaintiffs from the defendants, and the sale by the defendants to the plaintiffs, of the personal property comprising the whole of that certain dairy and milk distribution business conducted by the defendants under the trade name and style of "Step-and-Half Ranch", and for the leasing of the land and premises used by the de-

fendants for the conduct of the said business to the plaintiffs.

III.

That, as a result of the said oral negotiations, the plaintiffs, Charlotte L. Sheely, John H. Sheely, and Joe A. Sheely, with the defendants, entered into a "Conditional Sales Agreement", a "Lease", and a "Grazing Permit", true and correct copies of which said instruments are attached hereto, marked Exhibits "A", "B", and "C", [53] respectively, and by this reference made a part hereof the same as though set out herein in full, and that each of the said instruments was and is an integral part of the whole transaction, neither being acceptable to the plaintiffs without the others.

IV.

That by the terms of the said conditional sales agreement, the defendants agreed to sell to the plaintiffs, and the plaintiffs agreed to purchase of and from the defendants, the whole of that certain dairy and milk distribution business being then conducted by the defendants under the trade name and style of Step-And-Half Ranch, save and except the accounts receivable, but including the livestock, furniture and fixtures, farming implements and tools and motive equipment, all of which said property is set out in the inventory attached to the said conditional sales agreement, "Exhibit A", at and for the purchase price of Twenty-Eight Thousand Two Hundred Ninety-four Dollars (\$28,294.00), payable \$9800.00 upon the execution

of the agreement, and \$308.22 on the 10th day of August, 1941, and \$308.22 on the 10th day of each month thereafter until the purchase price should be paid in full, with interest at the rate of 6% per annum from July 1st, 1941, until paid.

V.

That the chief item contained in the inventory of property attached to the conditional sales agreement, "Exhibit A", was fifty-six head of cows; that said cows were figured by the parties at Three Hundred Dollars (\$300.00) per head, which accounted for \$16,800.00 of the total purchase price of \$28,294.00; that the defendants warranted that they were the lawful owners of the said cows and had the full right, power and authority to sell the same.

VI.

That the plaintiffs, Charlotte L. Sheely, John H. Sheely, and Joe A. Sheely, on the 28th day of June, 1941, relying upon the representations of the defendants, entered into the said conditional sales agreement, "Exhibit A", executed the said lease "Exhibit B", and signed the said grazing permit, "Exhibit C", and paid to the [54] defendants the sum of \$9,800.00 on account of the purchase price of the property described in the said conditional sales agreement, \$200.00 on account of the said lease, and \$110.00 on account of the said grazing permit, and thereafter on or about July 1st, 1941, entered into possession of the property and premises described in the said instruments, all of said acts being done for and in behalf of the above

named plaintiffs, Charlotte L. Sheely, John H. Sheely, Joe A. Sheely and Ross L. Sheely, co-partners.

VII.

That on the 28th day of June, 1941, at the insistence of the defendants, the plaintiff, Ross L. Sheely, did in writing guarantee the performance by the plaintiffs, Charlotte L. Sheely, John H. Sheely, and Joe A. Sheely, of the said conditional sales agreement and lease, a true and correct copy of which said guaranty is hereto attached, marked "Exhibit D", and by this reference made a part hereof the same as though set out herein in full.

VIII.

That the plaintiffs have performed to date of commencing this action the terms and conditions of the said conditional sales agreement, lease, grazing permit and guaranty, and, in addition to the payments alleged in Paragraph V, above, have paid to the defendants upon the said Conditional Sales agreement "Exhibit A", the sum of \$1541.10 and \$450.00 interest, and upon the said Lease, "Exhibit B", the sum of \$1000.00, and have paid to the defendants the sum of \$550.00 for their equity in a truck being purchased by the defendants from Wells Motor Company, Inc., of Anchorage, Alaska, and have paid to defendants the sum of \$2000.00 for hay and grain which the defendants had on order at the time of the execution of the conditional sales agreement, and as in said conditional sales agreement provided, and have purchased additional

equipment for the dairy and made improvements upon the premises at a cost of \$2513.00.

IX.

That at the time of the execution of the said Conditional Sales agreement, lease, grazing permit, and guaranty, and for a long time [55] prior thereto, a large number of the cows sold to the plaintiffs and described in the said conditional sales contract were diseased and infected with Bang's Disease or contagious abortion, which fact was well known to the defendants; and unknown to the plaintiffs; but notwithstanding such knowledge upon the part of the defendants, and with the intent to injure the plaintiffs, the defendants sold and delivered the said cows to the plaintiffs and accepted from the plaintiffs a portion of the purchase price thereof as hereinabove alleged.

X.

That all of the said cows were purchased by the plaintiffs as and for a dairy herd, which fact was well known to the defendants, and the said disease with which the said herd was and is infected renders the herd of little value for dairy purposes.

XI.

That the plaintiffs have suffered damages in the sum of Fifteen Thousand Dollars (\$15,000.00) by reason of the wrongful acts and omissions of the defendants herein alleged, and will suffer irreparable damage if they are required to perform their agreements with the defendants, as herein described,

and as hereto attached and marked "Exhibits A, B, C, and D".

And for a Second Cause of Action Against the Defendants, Plaintiffs Allege: [56]

I.

That on the 28th day of June, 1941, the plaintiffs above named were copartners and engaged in the dairy business in the Anchorage Precinct of the Third Division of the Territory of Alaska.

II.

That on the 28th day of June, 1941, and for a long time prior thereto, the plaintiffs owned a large dairy herd, and operated a dairy business near the town of Palmer, in the Third Judicial Division of the Territory of Alaska, and that the cows comprising the said dairy herd were free from the disease known as Bang's Disease, or contagious abortion.

III.

That on the said date, and for a long time prior thereto, the defendants owned a large herd of cows, and operated a dairy business near the town of Anchorage, in the Third Judicial Division of the Territory of Alaska.

IV.

That on the said date, and for a long time prior thereto, the dairy herd of the defendants was infected with the said disease known as Bang's Disease, or contagious abortion, which fact was well

known to the defendants, and unknown to the plaintiffs.

V.

That on the 28th day of June, 1941, in violation of law, the defendants, without disclosing to the plaintiffs the fact that the said herd was diseased, sold to the plaintiffs fifty-six cows and one bull comprising the entire dairy herd of the defendants, and warranted that they had full right, power, and authority to sell the same.

VI.

That the plaintiffs, not knowing that the cows which they purchased from the defendants were infected with Bang's Disease, intermingled said cows with those of their own herd, and, as a result, thereof, their own dairy herd has become infected with the said disease, all to their damage in the sum of \$10,000.00. [57]

Wherefore, plaintiffs pray:

1. That the Conditional Sales Agreement, "Exhibit A", described in plaintiffs first cause of action be by this court decreed illegal and void;

2. That the lease, "Exhibit B", the Grazing Permit, "Exhibit C", and the Guaranty, "Exhibit D", be rescinded, cancelled, and declared void as being part of the same transaction and based upon and supported by the illegal agreement, "Exhibit A";

3. That the plaintiffs have judgment against the defendants, and each of them, for the sum of \$15,000.00 on account of their first cause of action;

4. That plaintiffs have judgment against the defendants, and each of them, for the sum of \$10,000.00 on account of their second cause of action;

5. That plaintiffs have such other and further relief, as to the court may seem just and equitable in the premises;

6. That plaintiffs have judgment for their costs.

7. That the defendants be restrained and enjoined during the pendency of this cause from exercising any of the remedies provided for the defendants by the said conditional sales agreement, lease, grazing permit, and guaranty in the event of default by the plaintiffs.

W. N. CUDDY

Of Attorney for the Plaintiffs.

[58]

United States of America,
Territory of Alaska.—ss.

Ross L. Sheely being first duly sworn on oath, deposes and says: That I am one of the plaintiffs named in the foregoing amended complaint which I have read and know the contents thereof, and that the statements and allegations therein contained are true as I verily believe.

ROSS L. SHEELY

Subscribed and sworn to before me this 19th day of December, 1942.

W. N. CUDDY

Notary Public in and for Alaska.

My commission expires 8/29/45.

[Printer's Note: Exhibits "A", "B", "C" and "D", attached to the Amended Complaint, are not

reproduced here, as they are the same as Exhibits "A", "B", "C" and "D", attached to the Original Complaint, and printed in full at pages 10 to 28 of this printed record.]

[Endorsed]: Filed Dec. 21, 1942. [59]

[Title of District Court and Cause.]

REPLY

Come now the plaintiffs in the above entitled action and replying to the defendants' answer filed herein admit, deny and allege as follows:

I.

That on the 28th day of June, 1941 and at all times hereinafter mentioned, the plaintiffs above named were copartners engaged in the dairy business in the Anchorage Precinct of the Third Division of the Territory of Alaska.

II.

That the contracts set forth in defendants' answer and numbered "Exhibits 1, 2 and 3", were entered into by the said Charlotte L. Sheely, John H. Sheely and Joe A. Sheely for and in behalf of the above named plaintiffs, to wit, Charlotte L. Sheely, John H. Sheely, Joe A. Sheely and Ross L. Sheely.

Replying to defendants' answer to plaintiffs' second cause of action and affirmative defense and

counterclaim thereto plaintiffs admit, deny and allege as follows:

I.

That on the 28th of June, 1941, the plaintiffs above named were copartners and engaged in the dairy business in the Anchorage Precinct of the Third Division of the Territory of Alaska. [75]

II.

That during the month of June, 1941, the plaintiffs and defendants entered into oral negotiations for the purchase by the plaintiffs from the defendants, and the sale by the defendants to the plaintiffs, of the personal property comprising the whole of that certain dairy and milk distribution business conducted by the defendants under the trade name and style of "Step-and-Half Ranch", and for the leasing of the land and premises used by the defendants for the conduct of the said business to the plaintiffs.

III.

That as a result of said oral negotiations the plaintiffs, Charlotte L. Sheely, John A. Sheely and Joe A. Sheely, with the defendants entered into the conditional sales agreement, lease and grazing permit, true and correct copies of which said instruments are attached the original amended complaint herein and marked "Exhibits A, B, and C, and are set forth in the answer herein and designated in said answer as "Exhibits 1, 2 and 3", and by reference are hereby made a part of this reply.

That said contracts were entered into by the said

Charlotte L. Sheely, John H. Sheely and Joe A. Sheely for and in behalf of the plaintiffs named herein as copartners.

IV.

That by the terms of the said conditional sales agreement, the defendants agreed to sell to the plaintiffs, and the plaintiffs agreed to purchase of and from the defendants, the whole of that certain dairy and milk distribution business being then conducted by the defendants under the trade name and style of Step-And-Half Ranch, save and except the accounts receivable, but including the livestock, furniture and fixtures, farming implements and tools and motive equipment, all of which said property is set out in the inventory attached to the said conditional sales agreement, "Exhibit A", at and for the purchase price of Twenty-Eight Thousand Two Hundred Ninety-four Dollars (\$28,294.00), payable \$9800.00 upon the execution of the agreement, and \$308.22 on the 10th day of August, 1941, [76] and \$308.22 on the 10th day of each month thereafter until the purchase price should be paid in full, with interest at the rate of 6% per annum from July 1st, 1941, until paid.

V.

That the chief item contained in the inventory of property attached to the conditional sales agreement, "Exhibit A", was fifty-six head of cows; that said cows were figured by the parties at Three Hundred Dollars (\$300.00) per head, which accounted for \$16,800.00 of the total purchase price of \$28,-

294.00; that the defendants warranted that they were the lawful owners of the said cows and had the full right, power and authority to sell the same.

VI.

That the plaintiffs, Charlotte L. Sheely, John H. Sheely, and Joe A. Sheely, on the 28th day of June, 1941, relying upon the representations of the defendants, entered into the said conditional sales agreement, "Exhibit A", executed the said lease, "Exhibit B", and signed the said grazing permit, "Exhibit C", and paid to the defendants the sum of \$9,800.00 on account of the purchase price of the property described in the said conditional sales agreement, \$200.00 on account of the said lease, and \$110.00 on account of the said grazing permit, and thereafter on or about July 1st, 1941, entered into possession of the property and premises described in the said instruments.

VII.

That on the 28th day of June, 1941, at the instance of the defendants, the plaintiff, Ross L. Sheely, did in writing guarantee the performance by the plaintiffs, Charlotte L. Sheely, John H. Sheely, and Joe A. Sheely, of the said conditional sales contract and lease, a true and correct copy of which said guaranty is attached to the amended complaint herein and marked "Exhibit D" and by this reference made a part hereof the same as though set out herein in full. [77]

VIII.

That the plaintiffs have performed to date of commencement this action the terms and conditions of the said conditional sales agreement, lease, grazing permit, and guaranty, and, in addition to the payments alleged in Paragraph V, above, have paid to the defendants upon the said Conditional Sales agreement "Exhibit A", the sum of \$1541.10 and \$450.00 interest, and upon the said Lease, "Exhibit B," the sum of \$1000.00, and have paid to the defendants the sum of \$550.00 for their equity in a truck being purchased by the defendants from Wells Motor Company, Inc., of Anchorage, Alaska, and have paid to defendants the sum of \$2000.00 for hay and grain which the defendants had on order at the time of the execution of the conditional sales agreement, and as in said conditional sales agreement provided, and have purchased additional equipment for the dairy and made improvements upon the premises at a cost of \$2513.00.

IX.

That at the time of the execution of the said Conditional Sales agreement, lease, grazing permit, and guaranty, and for a long time prior thereto, a large number of the cows sold to the plaintiffs and described in the said conditional sales agreement were diseased and infected with Bang's Disease or contagious abortion, which fact was well known to the defendants; and unknown to the plaintiffs; but, notwithstanding such knowledge upon the part of the defendants, and with the intent to injure the

plaintiffs, the defendants sold and delivered the said cows to the plaintiffs and accepted from the plaintiffs a portion of the purchase price thereof as hereinabove alleged.

X.

That all of the said cows were purchased by the plaintiffs as and for a dairy herd, which fact was well known to the defendants, and the said disease with which the said herd was and is infected renders the herd of little value for dairy purposes.

[78]

Replying to defendants' second counterclaim and second cross complaint, plaintiffs admit, deny and allege as follows:

I.

Plaintiffs deny each and every allegation in said second counterclaim and second cross complaint, except those allegations hereinafter specifically admitted.

II.

Plaintiffs reaffirm, reallege and adopt in this reply to defendants' said second counterclaim and second cross complaint all the allegations set forth and contained in plaintiffs' reply to defendants' answer to plaintiffs' second cause of action.

Replying to defendants' third counterclaim and third cross complaint, plaintiffs admit, deny and allege as follows:

I.

Plaintiffs reaffirm, reallege and adopt all the allegations contained and set forth in plaintiffs' reply

to defendants' answer to plaintiffs' second cause of action.

Wherefore, plaintiffs pray for judgment against the defendants on their first cause of action for the sum of Fifteen Thousand Dollars (\$15,000.00); and on their second cause of action for the sum of Ten Thousand Dollars (\$10,000.00); and for judgment on plaintiffs' counterclaim herein in the sum of Eighteen Thousand One Hundred Sixty-four and 10/100 Dollars (\$18,164.10) and for their costs, disbursements and expenses herein had.

W. N. CUDDY

of Attorney for Plaintiffs. [79]

United States of America,
Territory of Alaska—ss.

Ross L. Sheely being first duly sworn on oath, deposes and says:

That I am one of the plaintiffs named in the foregoing Reply which I have read and know the contents thereof, and that the statements and allegations therein contained are true as I verily believe.

ROSS L. SHEELY

Subscribed and sworn to before me this 19th day of December, 1942.

[Seal]

W. N. CUDDY

Notary Public in and for Alaska. My commission expires 8/29-45.

[Endorsed]: Filed Dec. 21, 1942. [80]

[Title of District Court and Cause.]

MOTION TO STRIKE

Comes now the defendants above-named and moves this Honorable Court for an order striking from the files herein plaintiffs' amended complaint in this action upon the ground and for the reason that the same does not conform to the order of this Court permitting amendment.

This motion is based upon the records and files in this action.

Dated at Anchorage, Alaska, this 21st day of December, 1942.

THOMAS M. DONOHUE &
JOHN E. MANDERS

Attorneys for Defendants.

Service of the Foregoing Motion by Receipt of Copy Thereof Acknowledged on This 21st day of December, 1942.

W. N. CUDDY

Attorney for Pltfs.

[Endorsed]: Filed Dec. 21, 1942. [81]

[Title of District Court and Cause.]

MINUTE ORDER DENYING ORDER TO STRIKE

Now at this time the defendants' motion to strike the plaintiffs' amended complaint came on regularly for hearing before the Court, the plaintiffs,

Charlotte L. Sheely and Ross L. Sheely, being present in person, and all the plaintiffs being represented by their counsel, W. N. Cuddy and George B. Grigsby, Esq., the defendants, A. T. Martin, and Alice M. Martin, being present in person and being represented by their counsel, Thomas M. Donohoe and John E. Manders, Esqs.

Whereupon, after hearing the arguments of respective counsel, the Court denied the defendants' motion to strike, to which ruling the defendants, through their counsel, except and exception allowed. [82]

[Title of District Court and Cause.]

DEMURRER TO AMENDED COMPLAINT

Come now the defendants above-named and demur to the amended complaint of the plaintiffs in the above-entitled action upon the following grounds, to-wit:

1. That the first cause of action thereof does not state facts sufficient to constitute a cause of action.
2. That the second cause of action thereof does not state facts sufficient to constitute a cause of action.
3. That several causes of action have been improperly united.

THOMAS M. DONOHOE &
JOHN E. MANDERS

Attorneys for Defendants

Service of the Foregoing Demurrer by Receipt of Copy Thereof Acknowledged on This 21st day of December, 1942.

W. N. CUDDY

Attorney for the Pltfs.

[Endorsed]: Filed Dec. 21, 1942. [83]

[Title of District Court and Cause.]

MINUTE ORDER OVERRULING DEMURRER

Now at this time the defendants' demurrer to plaintiffs' amended complaint came on regularly for hearing before the Court, the plaintiffs, Charlotte L. Sheely and Ross L. Sheely, being present in person, and all the plaintiffs being represented by their counsel, W. N. Cuddy and George B. Grigsby, Esqs., the defendants, A. T. Martin and Alice M. Martin being present in person and being represented by their counsel, Thomas M. Donohoe and John E. Manders, Esqs.

Whereupon, it being stated that this demurrer was similar to the demurrer previously filed against the plaintiffs' original complaint, the Court overruled the defendants' demurrer to plaintiffs' amended complaint, to which ruling the defendant, through their counsel, except and exception allowed. [84]

[Title of District Court and Cause.]

MINUTE ORDER GRANTING DEFENDANTS
LEAVE TO PLEAD ESTOPPEL

Now at this time, on motion of Thomas M. Donohoe, Esq., of counsel for defendants, W. N. Cuddy and George B. Grigsby, Esqs., counsel for plaintiffs, being present and consenting thereto.

It Is Ordered that the defendants' answer may go to plaintiffs' amended complaint and that defendants may also have a right to plead estoppel.

[85]

[Title of District Court and Cause.]

TRIAL BY JURY CONTINUED

Now came the Trial Jury who, on being called, each answered to his or her name, came the respective parties and the respective counsel, as heretofore, and the trial of this cause was resumed.

At this time it was stipulated that the respective parties join in the reporting of this cause.

Opening statement to the Jury was had by W. N. Cuddy, Esq., for and in behalf of the plaintiffs.

Statement to the Jury was had by Thomas M. Donohoe, Esq., for and in behalf of the defendant.

Dr. Earl Francis Graves, being first duly sworn, testified for and in behalf of the plaintiffs.

At this time the defendants, through their counsel, objected to the testimony of the witness Dr. Earl Francis Graves, objection overruled, to which ruling the defendants except and exception allowed.

At this time the defendants, through their counsel, objected to all the evidence adduced in this case, objection overruled, to which ruling the defendants except and exception allowed.

At 11:50 o'clock A.M., the Court duly admonished the Trial Jury and continued the trial of this cause until 2:00 o'clock P.M. this date. [86]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on for hearing on the 21st day of December, 1942 before the above entitled court sitting at Anchorage, Alaska, and the plaintiffs appearing in person and by their attorneys, Warren N. Cuddy and George B. Grigsby, the defendants appearing in person and by their attorneys, T. M. Donohoe and John E. Manders.

A jury having been empaneled and sworn, witnesses were sworn and testified on behalf of the plaintiffs and defendants and thereafter, both parties having stipulated that their causes of action were in equity and that the jury be discharged and the cause be determined by the court, accordingly said jury was excused and the court having heard the testimony and being fully advised in the premises, now makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

I.

That on the 26th day of June, 1941 plaintiffs were copartners and engaged in the dairy business in the Anchorage Precinct, Third Division of the Territory of Alaska.

II.

That on said 26th day of June, 1941 the plaintiffs Charlotte L. Sheely, John H. Sheely and Joe A. Sheely, on behalf of said copartnership, entered into certain contracts with the defendants constituting a conditional sales agreement, a lease and an assignment of a grazing [87] permit; that by the terms of said conditional sales agreement the plaintiffs purchased from the defendants that certain dairy and milk distribution business being then conducted by the defendants in the Anchorage Precinct, Third Division, Territory of Alaska, under the trade name and style of "Step-And-Half Ranch", said purchase including the *life* stock and certain personal property then on said Ranch; that the aforesaid conditional sales agreement, lease and assignment of grazing permit were interdependent agreements constituting one transaction; that true and correct copies of said instruments are attached to the amended complaint herein and marked Exhibits "A", "B" and "C" respectively.

III.

That pursuant to said agreements hereinbefore described the plaintiffs paid to the defendants certain sums of money as follows, to wit:

\$9800.00 on the execution of said conditional sales agreement

308.22 on the 10th day of October, 1941

308.22 on the 10th day of November, 1941

308.22 on the 10th day of December, 1941

308.22 on the 10th day of August, 1941

308.22 on the 10th day of September, 1941

That on said lease agreement the plaintiffs paid to the defendants as follows:

\$200.00 on the 1st day of July, 1941

200.00 on the 1st day of August, 1941

200.00 on the 1st day of September, 1941

200.00 on the 1st day of October, 1941

200.00 on the 1st day of November, 1941

200.00 on the 1st day of December, 1941

That pursuant to said conditional sales agreement plaintiffs paid to defendants on and before December 10, 1941 the sum of \$450.00 interest which became due under said agreement.

That in consideration for the assignment of said grazing permit the plaintiffs paid to defendants on August 19, 1941 the sum of \$110.00.

That at various times prior to January, 1942 the plaintiffs paid for permanent improvements to said dairy ranch and for durable supplies and equipment the sum of \$1766.85; that the payments and expenditures [88] set forth in this paragraph amount to the sum of \$14,867.95.

IV.

That pursuant to said conditional sales agreement, lease and grazing permit, the plaintiffs on the 1st

day of July, 1941 entered into the possession of said Step-And-Half Ranch and dairy business and the cows and personal property thereon, mentioned in said agreement, and proceeded to conduct a dairy business; that at the time said plaintiffs entered into said agreements and at the time said plaintiffs entered into possession of said premises, and for a long time prior thereto, a large number of the cows sold to the plaintiffs and described in the said conditional sales contract were diseased and infected with Bang's Disease or contagious abortion, which fact was well known to the defendants and unknown to the plaintiffs; that notwithstanding such knowledge upon the part of the defendants and without disclosing the same to the plaintiffs, the defendants sold and delivered the said premises and live stock thereon to the plaintiffs and accepted from the plaintiffs a portion of the purchase price thereof as hereinabove alleged.

V.

That on account of said cattle being diseased and infected with Bang's disease or contagious abortion, a great number thereof, to wit, 36, became useless for dairy purposes and plaintiffs were compelled on that account to slaughter and sell the same for beef, from which sale the plaintiffs derived the sum of \$4472.20; that 6 of said cows died on account of said disease and there are 14 cows and one bull left of the original herd, on the premises.

That the plaintiffs have also now on said premises 12 cows which were brought from a ranch in Palmer

and were intermingled with the original herd on the Step-And-Half Ranch; that these said cows are now the property of the plaintiffs.

And from the foregoing facts the Court deduces the following Conclusions of Law. [89]

CONCLUSIONS OF LAW

I.

That the aforesaid conditional sales agreement, lease and grazing permit constituted one transaction and were illegal, against public policy and prohibited by Section 2 of Chapter 55 of the Session Laws of Alaska, 1919 (Sec. 626, Compiled Laws of Alaska, 1933).

II.

That the plaintiffs are entitled to recover from the defendants the sum of \$14,867.95, being moneys paid and expended as set forth in paragraph III of the Findings of Fact herein, together with interest on the various payments and expenditures from the time made, amounting in all to the sum of \$16,091.89; that from this sum the defendants are entitled to deduct in the sum of \$4472.20, leaving the balance due from defendants to plaintiffs of the sum of \$11,619.69, for which plaintiffs are entitled to judgment against the defendants.

III.

That the plaintiffs are entitled to dispose of the 12 cows now on the Step-And-Half Ranch belonging to them, either by slaughtering or otherwise as may be permitted by law.

IV.

That said conditional sales agreement, lease agreement and assignment of grazing permit should be rescinded.

V.

That the defendants are entitled to immediate possession of the said premises constituting the Step-And-Half Ranch and the live stock and personal property thereon, except the said 12 cows belonging to plaintiffs; to the possession of the land described in the said lease agreement and to the use of the area described in said grazing permit.

Let a decree be entered accordingly.

Dated at Anchorage, Alaska, this 4th day of January, 1943.

SIMON HELLENTHAL,
District Judge.

To each of the above the defts. object and an exception is allowed them.

SIMON HELLENTHAL,
District Judge. 1/4/43 [90]

[Endorsed]: Filed Jan. 4, 1943. [91]

In the District Court for the Territory of Alaska,
Third Division

No. A 2827

CHARLOTTE L. SHEELY, JOHN H. SHEELY,
JOE A. SHEELY, and ROSS L. SHEELY,
Copartners,

Plaintiffs,

vs.

A. T. MARTIN and ALICE M. MARTIN,
Defendants.

DECREE

This cause coming on for trial on the 21st day of December, 1942, before the above entitled court, the plaintiffs appearing in person and by their attorneys, Warren N. Cuddy and George B. Grigsby, and the defendants appearing in person and by their attorneys, T. M. Donohoe and John E. Manders; A jury having been empaneled and sworn, witnesses having been sworn and testified on behalf of plaintiffs and defendants and at the conclusion of the testimony both parties having stipulated that their causes of action were in equity and that they be determined by the court, thereupon, the jury having been excused and the court having determined the issues raised by the pleadings and being fully advised in the premises, having made findings of fact and conclusions of law, now therefore,

It Is Ordered, Adjudged and Decreed:

I.

That the plaintiffs have and recover from the defendants the sum of \$11,619.69 with interest according to law from the date hereof.

II.

That plaintiffs sell for beef or otherwise dispose of as may be permitted by law the 12 cows belonging to plaintiffs and now on the premises known as the "Step-And-Half Ranch" near Anchorage, Alaska, and retain the proceeds thereof. [92]

III.

That the conditional sales agreement, agreement for lease and assignment of grazing permit, copies of which are annexed to the amended complaint herein and marked Exhibits "A", "B" and "C" respectively, be, and the same are declared illegal and are hereby rescinded.

IV.

That the defendants have possession of the leased premises known as the "Step-And-Half Ranch", the live stock and personal property thereon, except 12 cows belonging to plaintiffs; that defendants have possession of the land described in said grazing permit.

V.

That the plaintiffs have and recover their costs and disbursements herein amounting to the sum of

.....

Dated this 4th day of January, 1943.

SIMON HELLENTHAL,
District Judge.

To the foregoing the defendants object and an exception is allowed defendants.

SIMON HELLENTHAL,
District Judge. 1/4/43

[Endorsed]: Filed Jan. 4, 1943. [93]

[Title of District Court and Cause.]

MOTION FOR A NEW TRIAL

Come now the defendants above named and move this honorable court for an order setting aside and vacating the judgment heretofore entered in the above entitled action in favor of plaintiffs and against the defendants, and feeling aggrieved by such judgment move that a new trial of said action be granted to said defendants for the following causes alleged by defendants as materially effecting their substantial rights and the rulings of the court which were prejudicial to their substantial rights, to wit:

Errors in law occurring at the trial and excepted to by the defendants;

1. The court erred in overruling the demurrer of defendants to the complaint of plaintiffs on file herein.

2. The court erred in permitting and allowing the complaint of plaintiffs to be amended by setting

forth a partnership including plaintiff, Ross L. Sheely.

3. The court erred in denying defendants' motion to strike the amended complaint of plaintiffs from the files in said action.

4. The court erred in overruling the demurrer of defendants to the amended complaint of plaintiffs on file in said action.

5. The court erred in admitting the testimony of Dr. Earl F. Graves. [94]

6. The court erred in overruling the objection of defendants to all of the testimony on behalf of the plaintiffs in said action.

7. The court erred in admitting in evidence plaintiffs' Exhibit "C", a Bangs disease test report, Serial No. 1388, dated March 7, 1941.

8. The court erred in denying defendants' motion to strike plaintiffs' Exhibit "C" from the files in said action.

9. The court erred in ordering two words, "butchered", from the face of Exhibit "C" removed.

10. The court erred in refusing to strike out the testimony of Ross L. Sheely in regard to moneys expended by him, he not being a partner to the contracts the subject matter of said action.

11. The court erred in refusing to strike out the testimony of Ross L. Sheely as to moneys paid by him on the ground that no partnership had been shown to exist between all of the plaintiffs in said action.

12. The court erred in refusing to strike the answer of Ross L. Sheely in response to court's inquiry as to moneys expended by him for improvements and supplies as incompetent and not limited in time to the date of the commencement of said action.

13. The court erred in denying defendants' motion at the close of plaintiffs' case to grant a non-suit on the ground that the amended complaint did not state facts sufficient to constitute a cause of action.

14. The court erred in denying defendants' motion at the close of plaintiffs' case to grant a non-suit on the ground that plaintiffs had not introduced sufficient evidence to sustain the allegations of their complaint.

15. The court erred in again denying defendants' motion for non-suit at the close of plaintiffs' case on the ground that plaintiffs had not introduced sufficient evidence to sustain the allegations of their complaint.

16. The court erred in again denying defendants' motion to [95] grant a non-suit on the ground that the amended complaint did not state facts sufficient to state a cause of action.

17. The court erred in permitting witness Ross L. Sheely to explain the meaning and operations of the agreements, Exhibits "A", "B" and "C", he, the said witness not being a party to any of said agreements.

18. The court erred in denying to defendants the

right to introduce testimony bearing upon the increase of calves in the dairy herd of defendants.

19. The court erred in denying to defendants the right to introduce testimony and the amount of money received from the sale of milk from the defendants' herd of cows.

20. The court erred in permitting witness Ross L. Sheely to testify as to moneys expended by him under the contracts and agreements, Exhibits "A", "B" and "C", he not being a party to any of said contracts or agreements, Exhibits "A", "B" and "C".

21. The court erred in permitting witness Ross L. Sheely to testify as to expenditures by him, no partnership being shown of which said witness was a partner.

22. The court erred in permitting Charlotte Sheely, one of the plaintiffs, to testify that she signed the agreements and contracts, Exhibits "A", "B" and "C" on behalf of her copartners, no copartnership having been shown and the Exhibits "A", "B" and "C" do not show or refer to a partnership.

23. The court erred in permitting John H. Sheely, one of the plaintiffs, to testify that he signed the agreements and contracts, Exhibits "A", "B" and "C" on behalf of his copartners, no copartnership having been shown and the Exhibits "A", "B" and "C" do not show or refer to a partnership.

24. The court erred in overruling the objections of defendants' to the questions in regard to para-

graph VIII of the defendants' answer asked of witness A. T. Martin on cross-examination by plaintiffs. [96]

25. The court erred in signing and filing the findings of fact and conclusions of law in said action and in finding and without limiting by specific designation findings of fact I, II, III, IV and V of the findings of fact.

And the court erred in finding as conclusions of law therefrom paragraphs I, II, III and IV of the conclusions of law.

26. The court erred in signing and filing its decree based upon said findings of fact and conclusions of law and decreeing that plaintiffs have and recover from the defendants the sum of \$11,619.69 with interest according to law from date, January 4, 1943.

That the conditional sales agreement, agreement for leases and assignment of grazing permit, copies of which are annexed to the amended complaint in said action and marked Exhibits "A", "B" and "C" respectively, be and the same are declared illegal and are rescinded.

That plaintiffs have and recover their costs and disbursements in said action.

28. The court erred in applying the rule of damages for the destruction of thirty-six cows of the Martin dairy herd amounting to the sum of \$4,472.20, whereas, the rule of damages to be applied should be the values of each of said cows of said dairy herd for dairy purposes, and that the rule of damages should be the replacement value of

said cows in a sum of not less than \$300.00 per head, amounting to a sum of not less than \$10,800.00.

Wherefore, defendants move said court to grant a new trial in the above entitled action.

Dated this 23d day of January, 1943.

THOMAS M. DONOHOE,

JOHN E. MANDERS,

Attorneys for Defendants. [97]

Service acknowledged by receipt of a copy hereof this 23d day of January, 1943.

W. N. CUDDY,

GEO. GRIGSBY,

By W. N. CUDDY,

Attorneys for Plaintiffs.

[Endorsed]: Filed Jan. 23, 1943. [98]

[Title of District Court and Cause.]

MINUTE ORDER OVERRULING MOTION
FOR NEW TRIAL

This cause having come on regularly for hearing before the Court on the 15th day of April, 1943 on the defendants' motion for new trial, the plaintiffs being represented by W. N. Cuddy and George B. Grigsby, Esq., of their counsel, and the defendants being represented by Thomas M. Donohoe and John E. Manders, of their counsel, and the Court having heard the arguments of respective counsel and thereafter having granted counsel ten

days in which to prepare and submit briefs, and now on this day the Court having considered the briefs submitted by respective counsel and being fully and duly advised in the premises,

It Is Ordered that the defendants' motion for new trial be, and the same is hereby, overruled, to which ruling the defendants, through their counsel, except and an exception allowed. [99]

[Title of District Court and Cause.]

PETITION FOR ALLOWANCE OF APPEAL

To the Honorable Simon Hellenthal, Judge of the
District Court for the Third Division, Territory
of Alaska:

Your petitioners, A. T. Martin and Alice M. Martin, respectfully show:

I.

Petitioners are the defendants in the above entitled cause.

II.

A final judgment was entered in the above entitled cause against petitioners and in favor of plaintiffs, on January 4, 1943.

III.

A motion for new trial of the above cause was filed in the above entitled action on January 23, 1943, and thereafter, and on the 3rd day of June, 1943 said motion for new trial was denied.

Wherefore, petitioners pray that an appeal may be allowed from said judgment to the United States Circuit Court of Appeals for the Ninth Circuit, and in connection with this petition petitioners present herewith their assignment of errors.

Petitioners further pray that a supersedeas may be granted herein pending the final disposition of the cause, and that the [100] amount of surety may be fixed by the order allowing the appeal.

Dated August 24th, 1943.

THOMAS M. DONOHOE,

JOHN E. MANDERS,

Attorneys for defendants.

[Endorsed]: Filed Aug. 24, 1943. [101]

[Title of District Court and Cause.]

ASSIGNMENT OF ERRORS

Now come defendants and appellants herein and file the following assignments of error upon which they will rely in the prosecution of the appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the final decree made and entered in this cause on the 4th day of January, 1943 by the above entitled court as follows, to-wit:

1. The court erred in overruling the demurrer of defendants to the complaint of the plaintiffs on file herein upon the grounds that the same does not state facts sufficient to constitute a cause of action, which ruling was duly excepted to by the defendants herein and exception allowed.

2. The court erred in granting the motion for leave to amend complaint by the plaintiffs to incorporate therein that plaintiffs were a partnership including plaintiff Ross L. Sheely, the granting of which order was duly excepted to and exception allowed.

3. The court erred in denying defendants motion to strike plaintiffs' amended complaint upon the ground that the same did not conform to the order of the court permitting amendment, which was duly excepted to and exception allowed.

4. The court erred in overruling the demurrer to plaintiffs' [102] amended complaint upon the grounds that the same did not state facts sufficient to constitute a cause of action, which order was duly excepted to and exception allowed.

5. The court erred in denying defendants' objection to any testimony in support of plaintiffs' amended complaint, as shown by the objection to the testimony of plaintiffs' witness Earl Francis Graves, as follows:

"Q. By Mr. Cuddy: I will ask you whether or not during the month of April, 1941 you examined the dairy herd of A. T. Martin?

Mr. Donohoe: Objected to—the first cause of action does not state facts sufficient to constitute a cause of action, and the second cause of action does not state a cause of action and they have been improperly united.

Court: Motion overruled. Exception granted.

Donohoe: That will go to all this evidence. We object to the testimony of this witness, as to the

examination of the herd—it cannot vary the terms of the contract Exhibit “A”—the conditional sales contract involved herein.

Court: Motion overruled. Exception allowed.”

The witness was then permitted to testify as to the condition of the herd as to Bang’s disease.

6. The court erred in denying motion for nonsuit made by the defendants at the close of plaintiffs’ case upon the grounds that the complaint does not state facts sufficient to constitute a cause of action, and upon the further grounds that there is not sufficient evidence to sustain the allegations of plaintiffs’ complaint, to which ruling defendants excepted and exception was allowed.

7. The court erred in dismissing the jury and considering this cause as one of an equitable nature, over the objection of the defendants, to which ruling the defendants excepted and the exception was allowed. [103]

8. The court erred in refusing to allow defendants’ motion for a nonsuit at the close of the trial of this action, upon the grounds that the complaint does not state facts sufficient to constitute a cause of action and that there is not sufficient evidence to sustain the allegations of plaintiffs’ complaint, to which ruling defendants excepted and exception was allowed.

9. The court erred in overruling defendants’ objection to the introduction of plaintiffs’ Exhibit “C” introduced on the redirect examination of Earl Francis Graves, as follows:

"Donohoe: Object to the offer, it is too remote and not pertaining to the issues in this case.

Court: Objection overruled. Exception allowed."

The offer is received and marked Plaintiffs' Exhibit "C", being a report dated March 7, 1941.

Exhibit "C" being a record of the condition of Mr. Sheely's herd at Palmer, Alaska was then received.

10. The court erred in refusing to strike plaintiffs' Exhibit "C" introduced on the redirect examination of Earl Francis Graves, as follows:

"Q. By Mr. Donohoe: Are you sure that paper is the same as you prepared it on March 7, 1941, did you write that on there yourself?

A. No, that has been put on later.

Donohoe: We move to strike.

Court: I think the writing on the side should be stricken from that exhibit.

Donohoe: We move to strike the exhibit.

Court: The writing may be taken off.

Donohoe: Exception.

Court: Exception allowed. * * * * *

Donohoe: In order to keep the record straight we have to show what is on that exhibit.

Court: The record may show butchered was written on in two places after the report was made. The Court ruled that they [104] may be stricken.

Donohoe: Exception. The exhibit is not as originally prepared and will have undue influence upon the jury in the trial of this case.

Court: No objection was made at the time the

exhibit was offered on account of those words being there. Exception allowed."

The exhibit was the same exhibit "C", being a record of the condition of Mr. Sheely's herd of cows at Palmer, Alaska.

11. The court erred in overruling defendants' objection to questions asked plaintiffs' witness Ross L. Sheely on direct examination, as follows:

"Q. By Mr. Cuddy: I notice in Exhibits "A", "B", and "C" that your name is not on the list, not a signature to it but as a guaranty, will you explain to the jury how that situation arose?"

Donohoe: Objected to as incompetent, the pleadings and exhibits speak for themselves.

Court: Objection overruled. Exception granted."

Mr. Sheely was then permitted over objection to testify that he was operating as a copartner with the other members of the family and his reasons for having a copartnership, contrary to the original agreements entered into between plaintiffs and defendants herein.

12. The court erred in sustaining plaintiffs' objection to the question asked plaintiffs' witness Ross L. Sheely on cross-examination, as follows:

"Q. By Mr. Donohoe: How much have you received from the butchered calves?"

Grigsby: Objected to as immaterial.

Court: I will not go into the increase. Exception allowed.

Q. How much have you received from the sale of milk from these cows.

Grigsby: Objected to. [105]

Court: Objection sustained. Exception granted."

The court refused to permit defendants to prove the value of the milk products sold by plaintiffs, derived from said dairy herd and also refused to permit defendants to prove the value of the calves born to said dairy cows and received by plaintiffs, and the court refused to permit defendants to prove the value of other products sold from the ranch premises and received by plaintiffs.

13. The court erred in refusing to grant the motion of the defendants to strike the testimony of plaintiffs' witness Ross L. Sheely as to improvements made to the premises and as to what was a reasonable value for rental of the land, contrary to the amount agreed upon in the written lease, and as to the individual value of cows, and money spent by the witness Ross L. Sheely, as follows:

"Donohoe: I couldn't very well object to the questions of the Court, but if your Honor please I move to strike the answers of the witness as incompetent, irrelevant and immaterial.

Court: Motion denied.

Donohoe: I also object to the testimony of this witness as to monies spent by this witness as incompetent. This witness was not a party to this contract.

Court: Was this money paid under the contract?

A. Yes, sir.

Q. And you know it was paid under the contract?

A. Yes, sir.

Court: Motion overruled. Exception allowed.

Donohoe: He testified he paid it.

Grigsby: On whose behalf was this money paid—on your part or on the part of the co-partnership?

Donohoe: Object, there is no mention of a co-partnership in the agreement. [106]

Court: You may have an exception."

14. The court erred in overruling defendants' objection to the question asked plaintiffs' witness Charlotte Sheely on direct examination, as follows:

"Q. By Mr. Cuddy: Covering the purchase of cattle on the Martin ranch and a lease of the property on behalf of whom were those three signatures?

Donohoe: Object as incompetent. The papers speak for themselves.

Court: She may testify. Exception allowed.

A. I signed it for the copartners, the four, Mr. Sheely, myself, Jack and Joe."

15. The court erred in overruling defendants' objection to the question asked plaintiffs' witness John H. Sheely on direct examination, as follows:

"Q. By Mr. Cuddy: And in whose benefit did you sign such instrument?

Donohoe: Object to the question.

Court: Objection overruled.

Q. For whose benefit did you sign that agreement?

Donohoe: Object as incompetent, the papers speak for themselves.

A. Well, I signed it on behalf of—we were

planning a partnership, we were going to work it on shares.”

16. The court erred in finding:

(a) As in its first findings of fact, that on the 26th day of June, 1941 plaintiffs were copartners;

(b) As in its second findings of fact, that on said 26th day of June, 1941 plaintiffs Charlotte L. Sheeley, John H. Sheeley and Joe A. Sheeley “on behalf of said partnership,” entered into certain contracts, copies of which are attached to the amended complaint marked Exhibits “A”, “B” and “C”; [107]

(c) As in its third findings of fact, “That at various times prior to January, 1942 the plaintiffs paid for permanent improvements to said dairy ranch and for durable supplies and equipment the sum of \$1766.85;*****”

(d) As in its fourth findings of fact, “That at the time said plaintiffs entered into said agreements and at the time said plaintiffs entered into possession of said premises, and for a long time prior thereto, a large number of the cows sold to the plaintiffs and described in the said conditional sales contract were diseased and infected with Bang’s Disease or contagious abortion, which fact was well known to the defendants and unknown to the plaintiffs; that notwithstanding such knowledge upon the part of the defendants and without disclosing the same to the plaintiffs, the defendants sold and delivered the said premises and live stock thereon to the plaintiffs and accepted from the plaintiffs a portion of the purchase price thereof as hereinabove alleged.”

(e) As in its fifth findings of fact, that 36 of said cattle “became useless for dairy purposes and plaintiffs were compelled on that account to slaughter and sell the same for beef, from which sale the plaintiffs derived the sum of \$4472.20; that 6 of said cows died on account of said disease and there are 14 cows and one bull left of the original herd, on the premises.”

And to each of which said findings defendants excepted and said exceptions were allowed.

17. The court erred in forming its conclusions of law, as follows:

(a) Conclusion of law No. I: “That the afore-said conditional sales agreement, lease and grazing permit constituted one transaction and were illegal, against public policy and prohibited by Section 2 of Chapter 55 of the Session Laws of Alaska, 1919 (Sec. 626, Compiled Laws of Alaska, 1933)”. [108]

(b) Conclusion of Law No. II: “That the plaintiffs are entitled to recover from the defendants the sum of \$14,867.95, being moneys paid and expended as set forth in paragraph III of the Findings of Fact herein, together with interest on the various payments and expenditures from the time made, amounting in all to the sum of \$16,091.89; that from this sum the defendants are entitled to deduct in the sum of \$4472.20, leaving the balance due from defendants to plaintiffs of the sum of \$11,619.69, for which plaintiffs are entitled to judgment against the defendants.”

(c) Conclusion of Law No. III: “That the plaintiffs are entitled to dispose of the 12 cows now

on the Step-And-Half Ranch belonging to them, either by slaughtering or otherwise as may be permitted by law."

(d) Conclusion of Law No. IV: "That said conditional sales agreement, lease agreement and assignment of grazing permit should be rescinded."

(e) Conclusion of Law No. V: "That the defendants are entitled to immediate possession of the said premises constituting the Step-And-Half Ranch and the live stock and personal property thereon, except the said 12 cows belonging to plaintiffs, to the possession of the land described in the said lease agreement and to the use of the area described in said grazing permit."

To each of which conclusions of law defendants excepted and said exceptions were allowed.

18. The court erred in rendering its decree for the plaintiffs herein. The court's error in this regard was based upon the following errors of the court occurring during the trial of the case: All of the errors herein assigned, to-wit: Assignments of Error 1 to 17 inclusive.

WHEREFORE, defendants and appellants pray that the judgment in the above entitled cause be reversed and the cause remanded, [109] with instructions to the trial court as to further proceedings therein, and for such other and further relief as may be just in the premises.

Dated, this 24th day of August, 1943.

THOMAS M. DONOHOE

JOHN E. MANDERS

Attorneys for defendants and
Appellants.

[Endorsed]: Filed Aug. 24, 1943. [110]

[Title of District Court and Cause.]

ORDER ALLOWING APPEAL AND
SUPERSEDEAS

The petition of A. T. Martin and Alice Martin, defendants in the above entitled cause, for an appeal from the final judgment rendered therein, is hereby granted, and the appeal is allowed, and upon petitioners filing a bond in the sum of \$12,500.00 with sufficient sureties and conditioned as required by law, the same shall operate as a supersedeas of the judgment made and entered in the above cause and shall suspend and stay all further proceedings in this court until the termination of said appeal by the United States Circuit Court of Appeals for the Ninth Circuit.

Dated: August 24th, 1943.

SIMON HELLENTHAL

District Judge

[Endorsed]: Filed Aug. 24, 1943. [111]

[Title of District Court and Cause.]

CITATION ON APPEAL

To the Plaintiffs, Charlotte L. Sheely, John H. Sheely, Joe A. Sheely and Ross L. Sheely, Copartners, and to their attorneys Warren N. Cuddy and George B. Grigsby:

You and each of you are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be held at San Francisco, in the State of California, thirty (30) days from the date of the within citation, pursuant to the order allowing appeal on file in the Clerk's Office of the District Court for the Territory of Alaska, Third Division, and in that certain action pending in said United States District Court entitled, "Charlotte L. Sheely, John H. Sheely, Joe A. Sheely and Ross L. Sheely, Copartners, plaintiffs, vs. A. T. Martin and Alice M. Martin, defendants", being Number A-2827 on the files of said District Court, and wherein A. T. Martin and Alice M. Martin are appellants and you are appellees, to show cause, if any there be, why the judgment rendered against said A. T. Martin and Alice M. Martin should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Simon Hellenthal, District Judge for the Territory of Alaska. Third

Division, this 24th day [112] of August, 1943, and of the independence of the United States the 168th.

SIMON HELLENTHAL

Judge of the District Court
for the Territory of
Alaska, Third Division.

Attest:

[Seal] M. E. S. BRUNNELLE

Clerk of said Court.

[Endorsed]: Filed Aug. 24, 1943. [113]

[Title of District Court and Cause.]

SUPERSEDEAS AND COST BOND

Know All Men By These Presents: That we, A. T. Martin and Alice M. Martin, as principals, and Arthur F. Waldron and Edward McElligott as sureties, are held and finally bound unto Charlotte L. Sheely, John H. Sheely, Joe A. Sheely and Ross L. Sheely, Copartners, in the full and just sum of Twelve Thousand Five Hundred Dollars (\$12,500.00) to be paid to the said Charlotte L. Sheely, John H. Sheely, Joe A. Sheely and Ross L. Sheely, Copartners, their heirs, executors, administrators, successors and assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors, administrators, successors or assigns jointly and severally by these presents. Sealed with our seals and dated this 24th day of August, 1943.

Whereas, lately at the October 1942 term of the District Court for the Territory of Alaska, Third Division in a suit pending in said court between Charlotte L. Sheely, John H. Sheely, Joe A. Sheely and Ross L. Sheely, Copartners, plaintiffs, and A. T. Martin and Alice M. Martin, defendants, a judgement was rendered against the said A. T. Martin and Alice M. Martin, defendants, at the said October Term of Court, and the said A. T. Martin and Alice M. Martin, defendants, have petitioned for and been allowed an appeal to the United States Circuit Court of Appeals for the Ninth Circuit and a citation has been issued [114] directed to the said Charlotte L. Sheely, John H. Sheely, Joe A. Sheely and Ross L. Sheely, Copartners, citing them to appear in said court at San Francisco, California, thirty (30) days from and after the date of such citation.

Now the condition of the above obligation is such that if the said A. T. Martin and Alice M. Martin shall prosecute the said appeal to effect and answer all damages and costs if they fail to make good their plea, then the above obligation to be void, otherwise to remain in full force and effect.

[Seal]

A. T. MARTIN

[Seal]

ALICE M. MARTIN

Principals

[Seal]

EDWARD McELLIGOTT

[Seal]

ARTHUR F. WALDRON

Sureties

United States of America,
Territory of Alaska—ss:

Arthur F. Waldron and Edward McElligott being first duly sworn on oath, depose and say, each for himself and not one for the other: I am one of the sureties on the foregoing bond; that I am a resident of the Territory of Alaska owning property therein; I am not a counsellor or attorney at law, marshal, clerk of any court or other officer of any court; that I am worth the sum of Twelve Thousand Five Hundred Dollars (\$12,500.00), specified in the foregoing undertaking, exclusive of property exempt from execution and over and above all just debts and liabilities.

EDWARD McELLIGOTT

ARTHUR F. WALDRON

Subscribed and sworn to before me this 24th day of August, 1943.

[Seal] JOHN E. MANDERS

Notary Public for Alaska. My Commission expires 9/6/45.

The foregoing bond and undertaking is approved and allowed this 24th day of August, 1943.

SIMON HELLENTHAL

District Judge [115]

[Endorsed]: Filed Aug. 24, 1943. [116]

[Title of District Court and Cause.]

ACKNOWLEDGMENT OF SERVICE

The undersigned, attorneys for plaintiffs herein, hereby acknowledge receipt of true copies of each of the following documents, to-wit:

1. Petition for allowance of appeal.
2. Assignment of errors.
3. Order allowing appeal and supersedeas.
4. Supersedeas and cost bond.
5. Order extending time for settling bill of exceptions.
6. Citation on appeal.

Dated this 25th day of August, 1943.

W. N. CUDDY

GEO. B. GRIGSBY

Attorneys for Plaintiffs.

[Endorsed]: Filed Aug. 25, 1943. [117]

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR SETTLING BILL OF EXCEPTIONS

This matter coming on for hearing upon the application of the defendants A. T. Martin and Alice M. Martin, requesting sixty (60) days additional time to prepare and file the record on appeal in the above-entitled cause, and to settle the bill of exceptions; it is hereby

Ordered, that the defendants have sixty (60) days additional time, to-wit, until the 24th day of October, 1943, within which to prepare, file, or have

approved, the record and bill of exceptions in the above entitled cause.

Made and Ordered Entered at Anchorage, Alaska, this 24th day of August, 1943.

SIMON HELLENTHAL

District Judge

[Endorsed]: Filed Aug. 24, 1943. [118]

[Title of District Court and Cause.]

STATEMENT OF EVIDENCE AND BILL
OF EXCEPTIONS

This cause came on for trial before the Honorable Simon Hellenthal, Judge of the above entitled court, at a session of said court held at Anchorage, Alaska, in the Third Judicial Division of said Territory on the 19th day of December, 1942; the plaintiffs appearing in person and by their attorneys W. N. Cuddy and George Grigsby; the defendants appearing in person and by their attorneys John E. Manders and Thomas M. Donohoe.

Whereupon a jury was duly selected, empaneled and sworn. Proceedings were then had in said cause as shown by the statement of the evidence duly approved, settled and certified as correct and complete, as follows:

STATEMENT OF TESTIMONY

In order to sustain the issues in the above entitled cause the plaintiffs called as a witness in their behalf

EARL FRANCIS GRAVES

who being first duly sworn, testified as follows:

My name is Earl Francis Graves. I live at Palmer, Alaska. I am Territorial veterinarian. I have held that position since December of 1940. I graduated in veterinary in 1927 and have followed my profession continuously since that date. It is my work as Territorial veterinarian to examine all dairy and live stock for contagious diseases at least once a year if there are funds. These diseases specifically include tuberculosis and [119] contagious abortion or Bang's disease.

Q. I will ask you whether or not during the month of April, 1941 you examined the dairy herd of A. T. Martin?

Mr. Donohoe: Objected to—the first cause of action does not state facts sufficient to constitute a cause of action, and the second cause of action does not state a cause of action and they have been improperly united.

Court: Motion overruled. Exception granted.

Donohoe: That will go to all this evidence. We object to the testimony of this witness, as to the examination of the herd—it cannot vary the terms of the contract Exhibit “A”—the conditional sales contract involved herein.

Court: Motion overruled. Exception allowed.

A. Yes, I did.

On April 22, 1941, I examined the herd of Mr. Martin—no tuberculosis re-actors; I did find 21 with contagious abortion and 8 suspect re-actors

(Testimony of Earl Francis Graves.)

and the rest were clean. The number of clean cattle would be the difference between 21 and 8, and the total of 54 that I examined for tuberculosis. Fifty-four animals were examined by me at that time. This examination was being made by myself in the City of Anchorage. Mr. Morley of the Territorial Board of Health and Mr. Martin and myself were present at the time of the examination. As a custom, I make the hotels in each community my office and I ran the bloods down in the hotel, it happened to be the Parsons. I found so many re-actors that I thought Martin should see some of them run. Morley had Martin come up, and I ran a portion of the blood samples so Martin could see how we were reading—how it was done—we ran just some of the worst re-actors. I made up my report on the condition of the dairy herd when I concluded my work on it. This is the original. I always make a copy and give it to the owner. I gave Mr. Martin a copy of the original report. He was present when I ran some [120] of them through. Contagious abortion is Bang's disease. Bang is the name of the professor that found the bug years ago. It is hard to explain that it is a disease. It isn't unique in cattle, swine may get it, and people and horses. The greatest ravages occur in dairy herds of the country. It causes great loss—it may cause a cow to drop her calf before maturity and others carry them till maturity or she herself may be a carrier of the disease or may become infertile and barren and may never have calves. The loss is terrific to the

(Testimony of Earl Francis Graves.)

dairy man. During part of its lifetime it lies quiet—remains dormant and then when in heat, when the sexual organs are active it may be more or less acute, as it were. Males can get it and often do. If it affects the testicles they are worthless and when they breed they just pump the germs into the cows. It might not be in the testicles and might be in other tissues and would not be so effective. The principal way of spreading the disease is from the mouth—drippings in pastures—the principal way of spreading is from ingestion. The cattle are not violently ill, the average animal may be a virus re-actor clinically, she may look all right but she may be barren or spreading the disease. Taking it by and large it would make the production of milk drop. Some animals would milk normally—the average animal they go way down. They do not necessarily dry up quickly. If they don't carry their calf to maturity they may never come fresh, as it were. If they drop a calf it is more likely than not that the milk would stop shortly. If they didn't carry the calf the full time there is a likelihood she might not give much or any, she might dry up. The cow is a dead loss to the owner, it is good only for slaughter. I think it would be entirely fair to say that cows affected with Bang's disease their value is simply their meat value, that is the instructions of the Government. In April, 1941 I definitely told Mr. Martin his cows could not be sold as milk cows but they could [121] be sold for slaughter. That was in April, 1941. I made a later examination of that

(Testimony of Earl Francis Graves.)

same herd on January 18, 1942, after Mr. Sheely was operating the dairy. The results showed 32 re-actors and 4 suspects, 8 clean ones and the others showed a slight degree of infection—a slight degree of reaction on tests. Of the 56 only 8 were clean ones—the balance showed slight reaction. In slight reaction — had they been entirely clean there shouldn't have been anything at all. I gave Mr. Shealy a copy of my original report. I told him the cows were quarantined to the place and could not be sold as milk cows. He could not take them to Palmer and put them on his ranch there. I don't have those records with me as to that herd, the Sheely herd at Palmer. I examined them last year. There were some re-actors at Palmer. I do not remember when the date was. I don't have the records and I would hesitate to guess as to whether that was after some of the Martin herd had been taken to Palmer or before. It would take me as long as it would take to go to Palmer and return to get the records.

Cross Examination

Upon cross examination the witness testified as follows:

Not to my knowledge is there any provision against selling milk from this herd. It would rest with the City ordinances, I presume. I can't say whether my office permits selling the milk as long as it is pasturized. My department has nothing to do with that. It could be sold if the City ordinances would permit. My quarantine was a quarantine

(Testimony of Earl Francis Graves.)

against transporting the cows. They had to stay there. It was not to destroy them. That is right, it was a restriction against moving them from the farm. I couldn't say what is the average production of cows as to milk. My only experience is as a veterinarian. I haven't had occasion to determine the normal milk production of cows. It varies so greatly—from nothing to many pounds per day. I [122] have no idea what the average would be. I have examined cattle in the Palmer area.

Q.. Is there Bang's disease there?

A. Yes, sir, there is.

Grigsby: Objected to.

Court: It may be stricken.

The general husbandry was an improvement in the condition of the herd over the last time I examined the herd at the Step and a Half ranch.

Q.. Did you make a statement in the presence of Mrs. Bass the condition of the herd was better?

A. It couldn't have been with the figures showing what they are.

I might have made that statement of the general welfare and husbandry but certainly not with reference to Bang's disease. I designate cows at the time of examination by putting tags on their ears. They generally stay on from one season to another. Some night get pulled out. Some of these were the same cows I examined the first time. I don't know whether other cows were there. We would have to compare this. I can state from my records which were the same cattle. It would take quite a little while.

(Testimony of Earl Francis Graves.)

Grigsby: Plaintiff desires to move to dismiss the second cause of action relating to the Palmer herd of plaintiff's without prejudice.

Court: A non suit without prejudice is granted.

Donohoe: I would like to find out what they are suing for.

I determined that 41 cattle were in the January test that were in the April 22nd test. 54 were examined in the April test.

Q. Fifty-four and bulls?

A. At least one was bull, I don't have them designated as to sex. I believe he had two.

I have been engaged in my present profession since 1927. [123] The Territory of Alaska is now my employer. Bang's disease is a prevalent disease. I don't know whether there is only one state in the United States that is free from it. It is difficult to keep up with it. Bang's disease is prevalent in the Territory of Alaska. I have had occasion to examine cows in other places in the Territory of Alaska and have also examined them for tuberculosis. I do not order the extermination of a Bang's diseased cow. It is stated in the law that there is a prohibition as to moving cows from the place where they are. I did not order that they be killed. I couldn't tell you what is the percentage of cows in a herd that are normally dry. I have no idea. No, I wouldn't say that assuming a herd of the size of this herd which had 58 cows in it at the time of the transfer from the Martins to Sheelys were producing milk in quantities of 210 to 215 gallons per day and selling

(Testimony of Earl Francis Graves.)

at an average price of 80 to 90c per gallon was of no value for any purpose besides meat.

Q. Did you testify this morning that this herd had no value because of Bang's disease—no value except for meat.

A. It may be a bit abstract—if you got only a pint of milk and there was sufficient market for it certainly that quantity of milk would have considerable value, but the potential loss is terrific in loss of calves and sterility of cattle and the chance or possibility of people becoming ill from using the milk, the general public would be much better off with the animals destroyed.

Q. Didn't you testify you didn't require them to destroy the animals?

A. There is no such provision.

Q. They can sell the milk if it is pasturized?

A. That depends on the the City Ordinance.

Q. As far as the Department goes that is true?

A. Yes.

Q. You have a policy over tuberculine cattle and order [124] them destroyed if diseased?

A. Yes.

Q. You do not do that with Bang's diseased cows?

A. That is right.

Q. 210 to 215 gallons per day is that average or better than average?

A. I do not know.

Q. Taking your qualifications of a moment ago as to the damage to the herd, you can't whether there was a substantial decrease in milk in this one's can you?

A. That is true.

(Testimony of Earl Francis Graves.)

I am not sure that what I said is that as far as this particular herd is concerned it had no value except for meat purposes. The question would have to be read as to what I testified to this morning. Certainly this herd would have value for other purposes besides meat. Certainly it would have value as a herd producing milk. No, I don't know whether the production stated would be average or less than average or greater. I don't know what percentage were first producing. I don't know whether I discussed the matter with Martin. It would have no bearing on the subject so it is not likely. I don't know whether I discussed it with Mr. Martin.

Q. Didn't you tell Mr. Martin this was one of the best herds you had seen and it would be a shame to butcher it.

(The stenographic report of the record fails to show the answer.)

Upon

Redirect Examination

the witness testified as follows:

That is right. The records were made contemporaneously at the time of the tests.

Whereupon plaintiffs' Exhibit "A", being a report dated [125] April 22, 1941, and "B", being a report dated January 18, 1942 were received and marked, which said exhibits are as follows: [126]

April 22-1941

Plate
0504 BAI

BANGS DISEASE TEST REPORT
Territory of Alaska

BF 29 5N218	5	1	-	-	-	✓	29
BG 30 44756	6	+	+	-	-	✓	30
BJ 31 58034	4	+	-	-	-	✓	31
BA 32 60616	5	+	+	-	-	✓	32
BG 33 7268	5	+	-	-	-	✓	33
BA 34 95448	4	+	-	-	-	✓	34
BA 35 91534	5	+	-	-	-	✓	35
BI 36 98198	5	-	-	-	-	✓	36
BG 37 20643	3	-	-	-	-	✓	37
BI 38 9993	6	+	-	-	-	✓	38

[Pencil Note]: A. T. Martin 1941

Identification Pltfs' Exhibit A. Sheely et al,
Plaintiff, vs. Martin et al, Defendant.

No. A-2827 [128]



Spec 22-1941

BANGS DISEASE TEST REPORT

Territory of Alaska

Kind of Antigen

Serial Number 1388

Owner's Name A. T. Martin

Address Unchikovich, Alaska

"I certify that I have drawn these blood samples and correctly identified each ear tag number or registration name or number. This is test of all dairy stock six months of age or over."

Signed Care E. Evans D.V.M.
Approval Veterinarian

21 Nutsors
P Suspect

Serial No.	Age	Sex	1/50	200	400	Remarks	Sampling or Registration No.	Age	Sex	1/50	200	400	Remarks
81	5	+	+	+	+	✓	39	5	+	+	+	+	✓
82	5	+	+	+	+	✓	40	5	+	+	+	+	✓
83	5	+	+	+	+	✓	41	5	+	+	+	+	✓
84	5	+	+	+	+	✓	42	5	+	+	+	+	✓
85	5	+	+	+	+	✓	43	5	+	+	+	+	✓
86	5	+	+	+	+	✓	44	5	+	+	+	+	✓
87	5	+	+	+	+	✓	45	5	+	+	+	+	✓
88	5	+	+	+	+	✓	46	5	+	+	+	+	✓
89	5	+	+	+	+	✓	47	5	+	+	+	+	✓
90	5	+	+	+	+	✓	48	5	+	+	+	+	✓
91	5	+	+	+	+	✓	49	5	+	+	+	+	✓
92	5	+	+	+	+	✓	50	5	+	+	+	+	✓
93	5	+	+	+	+	✓	51	5	+	+	+	+	✓
94	5	+	+	+	+	✓	52	5	+	+	+	+	✓
95	5	+	+	+	+	✓	53	5	+	+	+	+	✓
96	5	+	+	+	+	✓	54	5	+	+	+	+	✓
97	5	+	+	+	+	✓	55	5	+	+	+	+	✓
98	5	+	+	+	+	✓	56	5	+	+	+	+	✓
99	5	+	+	+	+	✓	57	5	+	+	+	+	✓
100	5	+	+	+	+	✓	58	5	+	+	+	+	✓
101	5	+	+	+	+	✓	59	5	+	+	+	+	✓
102	5	+	+	+	+	✓	60	5	+	+	+	+	✓
103	5	+	+	+	+	✓	61	5	+	+	+	+	✓
104	5	+	+	+	+	✓	62	5	+	+	+	+	✓
105	5	+	+	+	+	✓	63	5	+	+	+	+	✓
106	5	+	+	+	+	✓	64	5	+	+	+	+	✓
107	5	+	+	+	+	✓	65	5	+	+	+	+	✓
108	5	+	+	+	+	✓	66	5	+	+	+	+	✓
109	5	+	+	+	+	✓	67	5	+	+	+	+	✓
110	5	+	+	+	+	✓	68	5	+	+	+	+	✓
111	5	+	+	+	+	✓	69	5	+	+	+	+	✓
112	5	+	+	+	+	✓	70	5	+	+	+	+	✓
113	5	+	+	+	+	✓	71	5	+	+	+	+	✓
114	5	+	+	+	+	✓	72	5	+	+	+	+	✓
115	5	+	+	+	+	✓	73	5	+	+	+	+	✓
116	5	+	+	+	+	✓	74	5	+	+	+	+	✓
117	5	+	+	+	+	✓	75	5	+	+	+	+	✓
118	5	+	+	+	+	✓	76	5	+	+	+	+	✓
119	5	+	+	+	+	✓	77	5	+	+	+	+	✓
120	5	+	+	+	+	✓	78	5	+	+	+	+	✓
121	5	+	+	+	+	✓	79	5	+	+	+	+	✓
122	5	+	+	+	+	✓	80	5	+	+	+	+	✓
123	5	+	+	+	+	✓	81	5	+	+	+	+	✓
124	5	+	+	+	+	✓	82	5	+	+	+	+	✓
125	5	+	+	+	+	✓	83	5	+	+	+	+	✓
126	5	+	+	+	+	✓	84	5	+	+	+	+	✓
127	5	+	+	+	+	✓	85	5	+	+	+	+	✓
128	5	+	+	+	+	✓	86	5	+	+	+	+	✓
129	5	+	+	+	+	✓	87	5	+	+	+	+	✓
130	5	+	+	+	+	✓	88	5	+	+	+	+	✓
131	5	+	+	+	+	✓	89	5	+	+	+	+	✓
132	5	+	+	+	+	✓	90	5	+	+	+	+	✓
133	5	+	+	+	+	✓	91	5	+	+	+	+	✓
134	5	+	+	+	+	✓	92	5	+	+	+	+	✓
135	5	+	+	+	+	✓	93	5	+	+	+	+	✓
136	5	+	+	+	+	✓	94	5	+	+	+	+	✓
137	5	+	+	+	+	✓	95	5	+	+	+	+	✓
138	5	+	+	+	+	✓	96	5	+	+	+	+	✓
139	5	+	+	+	+	✓	97	5	+	+	+	+	✓
140	5	+	+	+	+	✓	98	5	+	+	+	+	✓
141	5	+	+	+	+	✓	99	5	+	+	+	+	✓
142	5	+	+	+	+	✓	100	5	+	+	+	+	✓
143	5	+	+	+	+	✓	101	5	+	+	+	+	✓
144	5	+	+	+	+	✓	102	5	+	+	+	+	✓
145	5	+	+	+	+	✓	103	5	+	+	+	+	✓
146	5	+	+	+	+	✓	104	5	+	+	+	+	✓
147	5	+	+	+	+	✓	105	5	+	+	+	+	✓
148	5	+	+	+	+	✓	106	5	+	+	+	+	✓
149	5	+	+	+	+	✓	107	5	+	+	+	+	✓
150	5	+	+	+	+	✓	108	5	+	+	+	+	✓
151	5	+	+	+	+	✓	109	5	+	+	+	+	✓
152	5	+	+	+	+	✓	110	5	+	+	+	+	✓
153	5	+	+	+	+	✓	111	5	+	+	+	+	✓
154	5	+	+	+	+	✓	112	5	+	+	+	+	✓
155	5	+	+	+	+	✓	113	5	+	+	+	+	✓
156	5	+	+	+	+	✓	114	5	+	+	+	+	✓
157	5	+	+	+	+	✓	115	5	+	+	+	+	✓
158	5	+	+	+	+	✓	116	5	+	+	+	+	✓
159	5	+	+	+	+	✓	117	5	+	+	+	+	✓
160	5	+	+	+	+	✓	118	5	+	+	+	+	✓
161	5	+	+	+	+	✓	119	5	+	+	+	+	✓
162	5	+	+	+	+	✓	120	5	+	+	+	+	✓
163	5	+	+	+	+	✓	121	5	+	+	+	+	✓
164	5	+	+	+	+	✓	122	5	+	+	+	+	✓
165	5	+	+	+	+	✓	123	5	+	+	+	+	✓
166	5	+	+	+	+	✓	124	5	+	+	+	+	✓
167	5	+	+	+	+	✓	125	5	+	+	+	+	✓
168	5	+	+	+	+	✓	126	5	+	+	+	+	✓
169	5	+	+	+	+	✓	127	5	+	+	+	+	✓
170	5	+	+	+	+	✓	128	5	+	+	+	+	✓
171	5	+	+	+	+	✓	129	5	+	+	+	+	✓
172	5	+	+	+	+	✓	130	5	+	+	+	+	✓
173	5	+	+	+	+	✓	131	5	+	+	+	+	✓
174	5	+	+	+	+	✓	132	5	+	+	+	+	✓
175	5	+	+	+	+	✓	133	5	+	+	+	+	✓
176	5	+	+	+	+	✓	134	5	+	+	+	+	✓
177	5	+	+	+	+	✓	135	5	+	+	+	+	✓
178	5	+	+	+	+	✓	136	5	+	+	+	+	✓
179	5	+	+	+	+	✓	137	5	+	+	+	+	✓
180	5	+	+	+	+	✓	138	5	+	+	+	+	✓
181	5	+	+	+	+	✓	139	5	+	+	+	+	✓
182	5	+	+	+	+	✓	140	5	+	+	+	+	✓
183	5	+	+	+	+	✓	141	5	+	+	+	+	✓
184	5	+	+	+	+	✓	142	5	+	+	+	+	✓
185	5	+	+	+	+	✓	143	5	+	+	+	+	✓
186	5	+	+	+	+	✓	144	5	+	+	+	+	✓
187	5	+	+	+	+	✓	145	5	+	+	+	+	✓
188	5	+	+	+	+	✓	146	5	+	+	+	+	✓
189	5	+	+	+	+	✓	147	5	+	+	+	+	✓
190	5	+	+	+	+	✓	148	5	+	+	+	+	✓
191	5	+	+	+	+	✓	149	5	+	+	+	+	✓
192	5	+	+	+	+	✓	150	5	+	+	+	+	✓
193	5	+	+	+	+	✓	151	5	+	+	+	+	✓
194	5	+	+	+	+	✓	152	5	+	+	+	+	✓
195	5	+	+	+	+	✓	153	5	+	+	+	+	✓
196	5	+	+	+	+	✓	154	5	+	+	+	+	✓
197	5	+	+	+	+	✓	155	5	+	+	+	+	✓
198	5	+	+	+	+	✓	156	5	+	+	+	+	✓
199	5	+	+	+	+	✓	157	5	+	+	+	+	✓
200	5	+	+	+	+	✓	158	5	+	+	+	+	✓
201	5	+	+	+	+	✓	159	5	+	+	+	+	✓
202	5	+	+	+	+	✓	160	5	+	+	+	+	✓
203	5	+	+	+	+	✓	161	5	+	+	+	+	✓
204	5	+	+	+	+	✓	162	5	+	+	+	+	✓
205	5	+	+	+	+	✓	163	5	+	+	+	+	✓
206	5	+	+	+	+	✓	164	5	+	+	+	+	✓
207	5	+	+	+	+	✓	165	5	+	+	+	+	✓
208	5	+	+	+	+	✓	166	5	+	+	+	+	✓
209	5	+	+	+	+	✓	167	5	+	+	+	+	✓
210	5	+	+	+	+	✓	168	5	+	+	+	+	✓
211	5	+	+	+	+	✓	169	5	+	+	+	+	✓
212	5	+	+	+	+	✓	170	5	+	+	+	+	✓
213	5	+	+	+	+	✓	171	5	+	+	+	+	✓
214	5	+	+	+	+	✓	172	5	+	+	+	+	✓
215	5	+	+	+	+	✓	173	5	+	+	+	+	✓
216	5	+	+	+	+	✓	174	5	+	+	+	+	✓
217	5	+	+	+	+	✓	175	5	+	+	+	+	✓
218	5	+	+	+	+	✓	176	5	+	+	+	+	✓
219	5	+	+	+	+	✓	177	5	+	+	+	+	✓
220	5	+	+	+	+	✓	178	5	+	+	+	+	✓
221	5	+	+	+	+	✓	179	5	+	+	+	+	✓
222	5	+	+	+	+	✓	180	5	+	+	+	+	✓

January - 18 - 1942

BANGS DISEASE TEST REPORT
Territory of Alaska

Kind of Antigen 452A-B.H.I.

Serial Number 1388

Owner's Name Mr. Ross Sheely Address Chukchee, Alaska

"I certify that I have drawn these blood samples and correctly identified each; ear tag number or registration name or number of the test of all dairy stock six months of age or over."

Signed Paul F. Edwards, D.V.M.
Approval Veterinarian

32 Clean
Sample to other show slight

Tag No.	Sex	Age	Remarks	Year of Birth	Year of Registration	Year of Identification	Remarks
1381	1	7	Alaska	1400	1200	1200	+
1382	1	7	Alaska	1400	1200	1200	+
1383	1	7	Alaska	1400	1200	1200	+
1384	1	7	Alaska	1400	1200	1200	+
1385	1	7	Alaska	1400	1200	1200	+
1386	1	7	Alaska	1400	1200	1200	+
1387	1	7	Alaska	1400	1200	1200	+
1388	1	7	Alaska	1400	1200	1200	+
1389	1	7	Alaska	1400	1200	1200	+
1390	1	7	Alaska	1400	1200	1200	+
1391	1	7	Alaska	1400	1200	1200	+
1392	1	7	Alaska	1400	1200	1200	+
1393	1	7	Alaska	1400	1200	1200	+
1394	1	7	Alaska	1400	1200	1200	+
1395	1	7	Alaska	1400	1200	1200	+
1396	1	7	Alaska	1400	1200	1200	+
1397	1	7	Alaska	1400	1200	1200	+
1398	1	7	Alaska	1400	1200	1200	+
1399	1	7	Alaska	1400	1200	1200	+
1400	1	7	Alaska	1400	1200	1200	+
1401	1	7	Alaska	1400	1200	1200	+
1402	1	7	Alaska	1400	1200	1200	+
1403	1	7	Alaska	1400	1200	1200	+
1404	1	7	Alaska	1400	1200	1200	+
1405	1	7	Alaska	1400	1200	1200	+
1406	1	7	Alaska	1400	1200	1200	+
1407	1	7	Alaska	1400	1200	1200	+
1408	1	7	Alaska	1400	1200	1200	+
1409	1	7	Alaska	1400	1200	1200	+
1410	1	7	Alaska	1400	1200	1200	+
1411	1	7	Alaska	1400	1200	1200	+
1412	1	7	Alaska	1400	1200	1200	+
1413	1	7	Alaska	1400	1200	1200	+
1414	1	7	Alaska	1400	1200	1200	+
1415	1	7	Alaska	1400	1200	1200	+
1416	1	7	Alaska	1400	1200	1200	+
1417	1	7	Alaska	1400	1200	1200	+
1418	1	7	Alaska	1400	1200	1200	+
1419	1	7	Alaska	1400	1200	1200	+
1420	1	7	Alaska	1400	1200	1200	+
1421	1	7	Alaska	1400	1200	1200	+
1422	1	7	Alaska	1400	1200	1200	+
1423	1	7	Alaska	1400	1200	1200	+
1424	1	7	Alaska	1400	1200	1200	+
1425	1	7	Alaska	1400	1200	1200	+
1426	1	7	Alaska	1400	1200	1200	+
1427	1	7	Alaska	1400	1200	1200	+
1428	1	7	Alaska	1400	1200	1200	+
1429	1	7	Alaska	1400	1200	1200	+
1430	1	7	Alaska	1400	1200	1200	+
1431	1	7	Alaska	1400	1200	1200	+
1432	1	7	Alaska	1400	1200	1200	+
1433	1	7	Alaska	1400	1200	1200	+
1434	1	7	Alaska	1400	1200	1200	+
1435	1	7	Alaska	1400	1200	1200	+
1436	1	7	Alaska	1400	1200	1200	+
1437	1	7	Alaska	1400	1200	1200	+
1438	1	7	Alaska	1400	1200	1200	+
1439	1	7	Alaska	1400	1200	1200	+
1440	1	7	Alaska	1400	1200	1200	+
1441	1	7	Alaska	1400	1200	1200	+
1442	1	7	Alaska	1400	1200	1200	+
1443	1	7	Alaska	1400	1200	1200	+
1444	1	7	Alaska	1400	1200	1200	+
1445	1	7	Alaska	1400	1200	1200	+
1446	1	7	Alaska	1400	1200	1200	+
1447	1	7	Alaska	1400	1200	1200	+
1448	1	7	Alaska	1400	1200	1200	+
1449	1	7	Alaska	1400	1200	1200	+
1450	1	7	Alaska	1400	1200	1200	+
1451	1	7	Alaska	1400	1200	1200	+
1452	1	7	Alaska	1400	1200	1200	+
1453	1	7	Alaska	1400	1200	1200	+
1454	1	7	Alaska	1400	1200	1200	+
1455	1	7	Alaska	1400	1200	1200	+
1456	1	7	Alaska	1400	1200	1200	+
1457	1	7	Alaska	1400	1200	1200	+
1458	1	7	Alaska	1400	1200	1200	+
1459	1	7	Alaska	1400	1200	1200	+
1460	1	7	Alaska	1400	1200	1200	+
1461	1	7	Alaska	1400	1200	1200	+
1462	1	7	Alaska	1400	1200	1200	+
1463	1	7	Alaska	1400	1200	1200	+
1464	1	7	Alaska	1400	1200	1200	+
1465	1	7	Alaska	1400	1200	1200	+
1466	1	7	Alaska	1400	1200	1200	+
1467	1	7	Alaska	1400	1200	1200	+
1468	1	7	Alaska	1400	1200	1200	+
1469	1	7	Alaska	1400	1200	1200	+
1470	1	7	Alaska	1400	1200	1200	+
1471	1	7	Alaska	1400	1200	1200	+
1472	1	7	Alaska	1400	1200	1200	+
1473	1	7	Alaska	1400	1200	1200	+
1474	1	7	Alaska	1400	1200	1200	+
1475	1	7	Alaska	1400	1200	1200	+
1476	1	7	Alaska	1400	1200	1200	+
1477	1	7	Alaska	1400	1200	1200	+
1478	1	7	Alaska	1400	1200	1200	+
1479	1	7	Alaska	1400	1200	1200	+
1480	1	7	Alaska	1400	1200	1200	+
1481	1	7	Alaska	1400	1200	1200	+
1482	1	7	Alaska	1400	1200	1200	+
1483	1	7	Alaska	1400	1200	1200	+
1484	1	7	Alaska	1400	1200	1200	+
1485	1	7	Alaska	1400	1200	1200	+
1486	1	7	Alaska	1400	1200	1200	+
1487	1	7	Alaska	1400	1200	1200	+
1488	1	7	Alaska	1400	1200	1200	+
1489	1	7	Alaska	1400	1200	1200	+
1490	1	7	Alaska	1400	1200	1200	+
1491	1	7	Alaska	1400	1200	1200	+
1492	1	7	Alaska	1400	1200	1200	+
1493	1	7	Alaska	1400	1200	1200	+
1494	1	7	Alaska	1400	1200	1200	+
1495	1	7	Alaska	1400	1200	1200	+
1496	1	7	Alaska	1400	1200	1200	+
1497	1	7	Alaska	1400	1200	1200	+
1498	1	7	Alaska	1400	1200	1200	+
1499	1	7	Alaska	1400	1200	1200	+
1500	1	7	Alaska	1400	1200	1200	+

[Pencil Note]: Ross Sheeley 1942.

Identification—Pliffs' Exhibit B. Sheely et al,

Plaintiff vs. Martin et al, Defendant.

No. A-2827 [130]

(Testimony of Earl Francis Graves.)

Whereupon Exhibit "A" was read to the jury.

As an interpretation of the plus mark and the minus mark where a minus is means negative, no reaction, the pluses mean positives, "I" means incomplete, not a definite reaction but there is something there. Yes, sir. A plus indicates the animal had Bang's disease. I can identify the paper you hand me. It is a Bang's disease report test on Ross Sheely's herd at Palmer, Alaska, dated March 7, 1941.

Court: Is that part of your main case?

Argument followed.

Donohoe: When was this report written out?

A. Whatever the date is.

Q. Is this part of your original records?

A. That is a copy of my original.

Q. When was the copy made?

A. On that date, this is a duplicate of my original.

Donohoe: Object to the offer, it is too remote and not pertaining to the issues in this case.

Court: Objection overruled. Exception allowed.

The offer was received and marked plaintiffs' Exhibit "C", being a report dated March 7, 1941, reading as follows:

March 7, 1921

Bent's
711 1111 1111 1111

BANGS DISEASE TEST REPORT
Territory of Alaska

29	"	152	2	F	29
30	"	151	4	F	30
31	"	152	1	F	31
32	"	153	4	F	32
33	"	154	1	F	33
34	"	155	13	F	34
35	"	156	1	F	35
36					36
37					37

Identification—Pltfs. Exhibit C. Sheely et al,
Plaintiff, vs. Martin et al, Defendant. No. A-2728.



March 3, 1941

BANGS DISEASE TEST REPORT
Territory of AlaskaKind of Antigen LatexSerial Number 109Owner's Name Paul SheelyAddress Blaine, Alaska

"I certify that I have drawn these blood samples and correctly identified each ear tag number or registration name or number. This is test of all dairy stock six months of age or over."

Signed Paul Sheely DVM D.V.M.
Approval Veterinarian

Part of or Refers to 15th No.	Age	Sex	Reaction to Bangs Disease Test	Part of or Refers to 15th No.	Age	Sex	Reaction to Bangs Disease Test
1	4	F	negative	1			
2	1	F	"	2			
3	1	F	"	3			
4	1	F	"	4			
5	1	F	"	5			
6	1	F	"	6			
7	1	F	surfact	7			
8	1	F	surfact	8			
9	1	F	"	9			
10	1	F	"	10			
11	1	F	"	11			
12	1	F	"	12			
13	1	F	negative	13			
14	1	F	"	14			
15	1	F	"	15			
16	1	F	"	16			
17	1	F	"	17			
18	1	F	"	18			
19	1	F	"	19			
20	1	F	"	20			
21	1	F	"	21			
22	1	F	"	22			
23	1	F	"	23			
24	1	F	"	24			
25	1	F	"	25			
26	1	F	"	26			
27	1	F	"	27			
28	1	F	"	28			
29	1	F	"	29			
30	1	F	"	30			
31	1	F	"	31			
32	1	F	"	32			
33	1	F	"	33			
34	1	F	"	34			
35	1	F	"	35			
36	1	F	"	36			
37	1	F	"	37			

Identification—Plf/s. Exhibit C. Sheely et al,
Plaintiff, vs. Martin et al, Defendant. No. A-9728.

[133]

(Testimony of Earl Francis Graves.)

On that date, March 7, 1941, there were no reactors but there was one suspect in the Palmer herd of Mr. Ross Sheely affected with Bang's disease. There were 35 head of cows there.

The reading of plaintiffs' Exhibit "C" was waived.

There has not been found any cure for Bang's disease. In reference to Mr. Donohoe's question as to the value of a herd of cows that has Bang's disease and as to whether or not its value was more than its meat value, it might be, but he certainly wouldn't purchase such an animal as a dairy cow, I think it would be folly. The sale of such cows is prohibited.

Upon

Recross Examination

the witness testified as follows:

Q. The sale or the removal?

A. The law says the sale is prohibited.

Q. The law says you should kill them?

A. No.

Q. It says to own them is prohibited.

A. Yes, sir.

The type of report Exhibit "C" is a different type from Exhibits "A" and "B". "C" does not attempt to show the same information as given on "A" and "B". This is more for the layman, this shows a little more of the facts. Here I wrote the word negative. On Exhibits "A" and "B" there would have to be a plus after the animal to show

(Testimony of Earl Francis Graves.)

it had Bang's disease. Yes, there would have to be at least a plus, an incomplete would never get a plus.

Q. Does the one on Mr. Sheeley's herd you have marked as a suspect, would that have a plus after it.

A. My original would have, but ordinarily a layman doesn't understand a plus or a minus so I write it out.

Q. Then a plus after a cow on Exhibits "A" or "B" doesn't mean they had Bang's disease? [134]

A. Oh, yes.

Q. If they were suspects they would have that?

A. You can't split hairs, that is the designation as made by the Government.

Q. In Martin's plus means that Martin's had Bang's disease but on "C" it doesn't?

A. A suspected animal would.

Q. Are you sure that paper is the same as you prepared it on March 7, 1941, did you write that on there yourself?

A. No, that has been put on later.

Donohoe: We move to strike.

Court: I think the writing on the side should be stricken from that exhibit.

Donohoe: We move to strike the exhibit.

Court: The writing may be taken off.

Donohoe: Exception.

Court: Exception allowed.

The incubation period for Bang's disease is from a very few days to 30 or 31 days. I mean by a few, four or five. I said a moment ago that Bang's disease wasn't curable.

(Testimony of Earl Francis Graves.)

Donohoe: In order to keep the record straight we have to show what is on that exhibit.

Court: The record may show butchered was written on in two places after the report was made. The Court ruled that they may be stricken.

Donohoe: Exception. The exhibit is not as originally prepared and will have undue influence upon the jury in the trial of this case.

Court: No objection was made at the time the exhibits was offered on account of those words being there. Exception allowed.

I think the date of the third exhibit is March 7. As to whether or not those were Sheely's cows I examined that day or [135] other cows from other parts of the valley, I examined them at Sheely's ranch, I presume that Mr. Sheely owned them.

LLOYD A. MORLEY

was called as a witness on behalf of the plaintiffs and being first duly sworn, testified as follows:

My name is Lloyd A. Morley. I live at Anchorage and am senior sanitarian with the Territorial Department of Health. My employment is under the Territory of Alaska, under the Territorial Commissioner of Health's office. I helped in taking the blood samples to assist Dr. Graves in the examination of the cows of the Martin ranch in April, 1941. I held the cows and numbered the samples for Dr. Graves. I then brought the blood samples

(Testimony of Lloyd A. Morley.)

back into town. As far as I know Dr. Graves examined them in the hotel room. Some were run in the Territorial Department's branch laboratory. That is my office. Myself and Dr. Graves were present and I phoned Mr. Martin. A routine report was made by Dr. Graves as to the result of that run. We received the same report in our office which you received as Exhibit "A"—we do not have Exhibit "B". Mr. Martin was present when part were run. I took Dr. Graves out in my car and he delivered a copy to Mr. Martin.

There was no cross examination.

ROSS L. SHEELY

one of the plaintiffs, being first duly sworn, testified as follows:

My name is Ross L. Sheely and I live just outside of Anchorage. I have lived in Alaska about 12 or 13 years. Prior to moving just outside of Anchorage I lived at Palmer where I was a farmer. My farming included production of hogs, dairy supplies, dairy products, eggs, grain and hay. I had a dairy at Palmer. We milked some cows.

It was thereupon stipulated that the exhibits attached to the complaint, counter-claim and reply are identical and do not have to be re-introduced and can be referred to as Exhibits "A", [136] "B", "C" and "D". The reading of the exhibits was waived.

(Testimony of Ross L. Sheely.)

I entered into an oral agreement with the defendants for the purchase of the Martin dairy in June, 1941.

Q. I notice in Exhibits "A", "B" and "C" that your name is not on the list, not a signature to it but as a guaranty, will you explain to the jury how that situation arose?

Donohoe: Objected to as incompetent, the pleadings and exhibits speak for themselves.

Court: Objection overruled. Exception granted.

A. At the time of this deal when this contract and papers were signed, myself and my family, Jack and Joe and Mrs. Sheely were operating as co-partners as a family. I was under contract, farming under the Co-Operative Association who had done no business out of the valley and it would be impractical and impossible to produce milk here, haul it to Palmer, pastuerize it and haul it here for distribution. I couldn't do that nor could they do it, they don't pick up milk. In order that my product here could not conflict with the product from the valley farm on which membership in the Co-Op was based I didn't want my name to appear on this contract here not knowing the reaction of the manager of the Co-Op to producing a product away from the valley. It would have been suicide to produce it here and haul it to Anchorage. I would look like a competitor. That condition might have arisen—in order to eliminate that, as the rest of the family were not on contract there they signed the contract and all products of the farm at Palmer were sold

(Testimony of Ross L. Sheely.)

through the Co-Op and would be as long as I remained a member. The Board of Directors later thought it better that I discontinue my membership in the Association, which I did.

Q. On whose behalf were these contracts or guaranty?

A. I did that at the demand of Mr. and Mrs. Martin. After making the deal they refused to accept the signatures of the other [137] three unless I guaranteed fulfillment.

\$9800 was paid on the conditional sales contract on July 28, \$1541.10 was paid between then and the first of January, plus \$450 interest. The conditional sales contract covers the sale of the cattle—56 cows and one bull.

Q. In arriving at this purchase price how were the cattle figured?

A. At their cost.

Donohoe: Objected to as incompetent, irrelevant and immaterial. The contract is in evidence and sets up the purchase price.

Court: Objection sustained.

A. \$300 apiece.

Q. \$300 a head?

A. Yes, sir.

I took possession of the cattle the first day of July, 1941. I am still in possession of the farm.

Q. How much milk were the cows giving at the time you took possession?

Court: It is immaterial.

My first definite information that this herd had Bang's disease came when I was told that it would not be permissible for me to take these cattle from

(Testimony of Ross L. Sheely.)

Anchorage farm when they dried up to Palmer where I could operate at much less cost as I had a stubble field, etc. When told by the veterinarian I was liable to the law and would be prosecuted. Prior to that I had been taking them to the Palmer ranch. I was told this practice must stop in October or possibly November, 1941. The cattle aborted. August 26th, 1941 is the first abortion.. August 26th, 1941 is the first one I had after taking the place over. Sometimes cattle will abort a calf other than from disease. I thought from the size of the herd it might have been bumped or slipped [138] and I did not suspect on that date that the whole herd was infected. On September 6, 1941 two cows aborted, the 6th of September. The next cow was September 18. The next cow October 7. The next cow November 5. Then November 8, November 12, December 8. The cows that reacted definitely, with two exceptions, those cows did not come to a very high milk production. One came up to about as much milk as it would have normally given. The others hardly gave enough to pay to milk them. In a few cases cows which aborted, in many cases were giving milk at the time and continued about as they had after they got over the sickness of the abortion continued as they had before. They dropped down in their milk supply. Instead of being fresh cows, they were milking as cows fresh 9 or 10 months previously. I would say aborted cows gave 50% of normal production. When these cattle aborted the milk supply gradually dried up for a period. In the

(Testimony of Ross L. Sheely.)

average case they would not breed again. They will, after aborting, cows frequently go for several months before they will accept the service of a bull, they often become sterile and there is a long period of months in the majority of cases before they can get pregnant again. They were confined to the ranch where feed is high priced so I butchered them. I have butchered about 35 or 36 head. Of the original Martin herd those that are left won't vary more than one or two—there are 16 or 17 head. I certainly did not know at the time of the purchase that the herd was afflicted with Bang's disease.

Q. Now to go back a moment, you paid \$9800 on the purchase of the cattle, paid that at the time of the execution of the instrument?

Donohoe: That is not a fair question—it is on the whole thing, not on the cows.

Q. The monthly payments were \$308—you testified how much you paid on the conditional sales contract? [139]

A. That's right.

I paid \$110 on the grazing permit. I paid \$200 a month on the lease for the ground. That is Exhibit "A". \$1200 I believe was paid on that lease. At the time I purchased the place Mr. Martin had a truck on order and the old truck was valued and turned in on the new truck at \$550. I have completed the payments on that. As to how much I paid for the hay and grain that was on the place I couldn't segregate what was on the place—there was a carload of hay and a carload of grain ordered

(Testimony of Ross L. Sheely.)

when I made the agreement. I believe they came in about the time of the written contract. I was to pay for what was on order, it was around \$2000. I have added additional equipment to the dairy and made extra expenditures on improvements on the dairy. For equipment, supplies and improvements \$2513.15. I have it itemized — milk cases, quart bottles, foot bags, half pint bottles, pump for milking machine, cartage on hay and grain, box stall, closets in house, manuring, pasture, clearing land, paid on separator motor, painting milk room, wiring on separator, lumber for floor in feedway of barn, another motor, filter and blackout equipment on the barn. What I paid on that new truck is in the \$2500. It was put in at the time this was made up in December. As to how many of the original Martin herd I have on the premises at the present time my answer before was not exact. I think I said within 2 of right—that is 16, in a minute I can tell you exactly. I have exactly 14 head of cows on the place which were in the original Martin herd and one below. I have 27 cows on the place now. I think the way it would come out is the difference between 14 and 27 or 13 is the number that I have brought down from the Palmer place. I cannot move those 13 off the place. I think it is exactly 36 cattle that I have killed. Those all belonged to the Martin herd. I believe 6 or 7 of the diseased cattle have died. I received \$4472.20 for the cattle that were [140] slaughtered.

(Testimony of Ross L. Sheely.)

Upon

Cross Examination

the witness testified as follows:

My occupation before I commenced dairying in Palmer was I farmed at Palmer. Before I got any cows I raised chickens and pigs. Before that I was manager of the Corporation. Before that my occupation was with the Extension Service. I was not teaching agriculture. I will qualify that in this way. The Extension Service is supposed to carry the results of experiment stations to the public in general. No I was not carrying on experiments with cows in the Extension Service. No, the Extension Service didn't have anything to do with dairying. As to whether they had anything to do with that in experiment stations, when they carried on experiments and a bulletin was published it became the duty of the Extension Service to distribute that information. As to whether or not it was primarily my duty to distribute that to farmers, it was on phases of agriculture and home economics. When I was manager of the Corporation it was largely construction, land clearing and the building of houses and barns. Since I have been running the farm at Palmer I have been at times taking care of cows belonging to others. Yes, in the Summer of 1941 we took in some cows that were not our own. We had some cattle there in the Spring. I don't know the dates, I had some from two different people, Walter E. Huntley and Neil Miller. I had some on the place in the winter of 1938 from the Corporation and none after

(Testimony of Ross L. Sheely.)

that. As to cows that were taken back under conditional sales I have not had any since then. I had the Huntley cows the middle of the winter of 1940 and 1941. They stayed there until June, 1941. I got Mr. Miller's cows possibly in March, 1941. I believe there were four. There were two of Huntley's. As to the dates when I butchered the cows previously [141] mentioned they were April, the 19th of October, 1941; Belle, the 3rd of March, 1942; Bertha, the 10th of February, 1942; August 7, 1941; October 12, 1941; October 25, 1942; October 12, 1941. October 12, 1941 there were two on that date, that sometimes occurred. October 20, 1942; October 15, 1942; October 21, 1942; November 7, 1942; November 5, 1942; October 3, 1942; October 14, 1942; January 25, 1942; August 7, 1942; January 31, 1942; October 6, 1941; November 11, 1942; September 14, 1941; September 2, 1942; December 14, 1941; October 29, 1942; October 20, 1941; July 1941; I don't have the date in there. I possibly have it in the other book. That was a cow that was taken to Palmer; as soon as we found she was a re-actor we butchered her there—a cow from the Martin herd. November 12, 1942; November 2, 1942; May 22, 1942; October 12, 1942; September 8, 1942; September 2, 1942; November 16, 1942; September 3, 1942; November 14, 1942. The last cow I butchered I haven't posted in this book. I have it at home. That was in November of this year. The last cow butchered was March 22, 1942. That is the last one in my book but it is alphabetical. Yes, I think I

(Testimony of Ross L. Sheely.)

have named now all the cows I have butchered. That is only from the Martin herd. I did not include anything of my own. I have butchered six others that I haven't included here. The amount I have been getting for beef in November of this year varied, depending on the cow. The average for beef now has been 28c, commencing lately. It used to be 18. Yes, 28c this fall. I think from the middle of September was the last time they would do any good grazing in the open this year but I kept them outside for exercise after that.

Q. Mr. Sheely, in addition to these and those you testified aborted, you butchered 36 calves and sent six to Palmer didn't you? Of the total calves 36 were butchered, 6 were sent to Palmer and 6 died?

A. I never made a statement of the calves. [142]

Q. You mean there were no live births?

A. Aborted calves are sometimes alive and sometimes dead.

Q. Out of the births—either aborted or otherwise—36 were butchered, 6 sent to Palmer and 6 died, is that correct? A. I don't know.

Q. Look at that book and look at the references to births and answer that?

A. When this book was handed to you it was folded right here showing the cattle, it was turned over another sheet, there is a compilation here 12/21/42, it says 36 butchered, 6 died, 6 sent to Palmer, that has nothing to do with what I testified to.

(Testimony of Ross L. Sheely.)

Q. Answer the question please?

A. I don't know.

Q. You can refer to that record and find out?

A. Yes, sir.

Q. Will you do it then?

A. As far as I can compute this Mr. Donohoe, there is 8 calves died, no 16 died, 13 went to Palmer, killed 18 and gave 8 away, I may be wrong on the number killed.

Q. As a matter of fact you took approximately 35 to Palmer but there might be some you gave away, were some included in that? A. Yes.

Q. Didn't you take 35 calves to Palmer?

A. No, around 20.

These calves were not vaccinated when they were born. I sold meat to different people in town. I have no contracts with people to sell meat. Part of the meat went to the hospital, not on a regular basis of delivery. Sometimes they buy a cow from me and sometimes from somebody else. I have not made any payments on the lease since December. I still have possession of the personal property leased other than the cows. I did not sell the cat. I didn't let anyone else have it. No, sir, I didn't rent it. [143] Mr. Bailey used it some. Yes, sir, for moving houses in town. As to whether I got anything out of it, I had the use of his tractor in Palmer. Rather than take this cat to Palmer we traded. No, I don't believe I have traded any other property other than cows. No, sir.

(Testimony of Ross L. Sheely.)

Q. How much have you received from the butchered calves?

Grigsby: Objected to as immaterial.

Court: I will not go into the increase. Exception allowed.

Q. How much have you received from the sale of milk from these cows.

Grigsby: Objected to.

Court: Objection sustained. Exception granted.

I don't believe I have rented anything else from that farm to anyone that I bought from Mr. Martin. I still have possession of all the rest other than the cows. I got only one bull and he is still there. I paid Mr. Martin on the truck that I got, \$550 the value of the old truck. The balance I paid to Well's Motor Company. Since then I have sold that truck myself. I included part of the payments that I made on the truck in the statement. I paid Mr. Martin for hay and grain and not to hay and feed companies that shipped it. I don't believe there was any hay or grain inventory to me. If there were any on the farm, if there was a few bags there I paid for them. The itemized list Mr. Martin gave me would show that. I paid for the new shipment. It is correct that this hay, grain and feed I received and paid for was a new inventory coming in and was used to feed the cows afterwards. I butchered the animal shown on plaintiffs' Exhibit "C" as a suspect. It was butchered as soon as I could get to the slaughter house to butcher it.

(Testimony of Ross L. Sheely.)

Court: You say you have 13 cows you brought from Palmer you can't take off? A. Yes, sir.

[144]

Q. What is the calue of those cows?

A. \$3900, as dairy cows.

Q. You value them at \$300 apiece.

A. Yes, sir.

Q. You agreed to pay \$200 a month for the rental of the land for a going dairy? As it was at that time? A. Yes, sir.

Q. What is the reasonable value of rental considering this herd was infected?

A. Well, I thought at the time I bought it it was satisfactory.

Q. What was the reasonable value of the rental as you occupied that place?

A. Perhaps \$50 a month.

Q. You think that \$50 a month would be reasonable? A. Yes, sir.

Q. You say you made improvements in the sum of \$2513.15, how much of that is for permanent improvements, less the money you paid for the truck and for supplies.

A. Milk cases are permanent and milk bottles are subject to inventory.

Q. You have a motor—that would last for 50 years?

A. No, they don't last that long because it is wet in the milk room, they don't last over two or three years.

(Testimony of Ross L. Sheely.)

Q. Will you look that over and see how much is permanent and how much is for repairs and replacements?

A. May I say this was made last December.

Q. I think it should be brought up to date.

Donohoe: I couldn't very well object to the questions of the Court, but if your Honor please I move to strike the answers of the witness as incompetent, irrelevant and immaterial.

Court: Motion denied. [145]

Donohoe: I also object to the testimony of this witness as to monies spent by this witness as incompetent. This witness was not a party to this contract.

Court: Was this money paid under the contract?

A. Yes, sir.

Q. And you know it was paid under the contract?

A. Yes, sir.

Court: Motion overruled. Exception allowed.

Donohoe: He testified he paid it.

Grigsby: On whose behalf was this money paid—on your part or on the part of the co-partnership?

Donohoe: Object, there is no mention of a co-partnership in the agreement.

Court: You may have an exception.

Court: I asked you what part of the \$2513.15 is for permanent improvements and what for repairs? A. I have such statement.

Q. How much is for permanent improvements?

A. \$2020.

Q. And the rest is for repairs?

(Testimony of Ross L. Sheely.)

A. Yes, I brought it up to date, with feed and supplies included.

Donohoe: If the Court please, defendants at this time move the answers of the witness be stricken as incompetent then, that is not at the commencement of this action.

Court: Motion denied. Exception granted.

The paper was thereupon offered, received without objection and marked plaintiffs' Exhibit "D", as follows:

ITEMIZATION OF EXPENDITURES AND PERMANENT IMPROVEMENTS AND SUPPLIES

June 28, 1941	Supplies, milk cases, etc.	\$ 32.50
June 28, 1941	Quart Bottles	110.90
June 28, 1941	1/2 Pint Bottles	80.00

[146]

June 28, 1941	Pulso-Pump (Purchased from Martins, still unused)	103.00
Finish Nov. 10, 1941	Heating Plant	721.70
Finish Nov. 10, 1941	New Hay Barn	300.00
Sept. 1941	Mangers in Cow Barn.....	110.00
Nov. 2, 1941	Box Stall	75.00
Oct. 20, 1941	Closets	75.00
Oct. 18, 1941	Clearing Land	45.00
July 1 to Oct. 31, 1941	Manuring Pasture	150.00
Nov. 1941	Milk Pump Motor	17.50
Nov. 15, 1941	Separator Motor	40.00
July 1941	Painting Milk Room	6.00
Oct. 1941	Wiring on Separator	1.90
Aug. 1941	Window Shades	13.40
Sept. 1941	Clothes Line	2.45
Aug. 1941	Lumber for floor in feedway of barn	32.50

(Testimony of Ross L. Sheely.)

March, 1941	Crepaco Electric Motor—Milk Pump	17.50
Sept. 1941	Towel Racks & Fixtures	11.75
Sept. 1941	Filter—line with fittings	43.55
Dec. 24, 1941	Barn Blackouts	40.00

Supplies on Order

Dec. 19, 1942	1 BBL Sterichlor	\$ 28.00
Nov. 18, 1942	1 BBL Wyandott	27.00
Oct. 17, 1942	10,000 Buttermilk Caps	10.00
Oct. 1, 1942	10,000 Cream Caps	10.00
Hay Ord. Dec. 12, 1942	1 car ordered from Seattle either just leaving or soon to leave 1 car hay in Seward enroute (bill re- ceived)	428.70

Supplies on Hand (Dec. 22, 1942)

182 sacks mixed 21% Protin dairy feed	689.78
2 tons hay @ 40.00	80.00
80,000 caps @ 2/57 per M/\$2.50 per case freight.....	256.60
1 2/5 carbon caps	27.10
1 Carton caps	19.10
1/2 BBL Sterichlor	14.00
1/2 Wyandott	13.50
2/3 BBL soap Powder	20.00
18 sacks Beet Pulp	82.98
Sawdust for bedding	25.00
Rental bottle capper	28.00
650 Gals. Diesel Oil 1/4 12.7	82.55
2 tons of Coal @ 15.00.....	30.00

Total.....\$3,901.96

Identification—Pltfs. Exhibit D—Sheely et al, Plaintiff, vs.
Martin et al, Defendant. No. A-2827.

Cross Examination continuing

Exhibit "D" covers the period of time from the time of the purchase of the place down to the present. The rest of the improvements were all made

(Testimony of Ross L. Sheely.)

prior to the commencing of this action. I am referring to improvements to the barn, the new hay barn. As [147] to whether I can mark opposite them the dates, they are all supported by vouchers I have in my files. I can approximate the dates within 30 days of any of them.

Court: I will permit the withdrawal of the exhibit so that you can put the dates on.

Yes, this includes such items as supplies on order and on hand. That would be difficult to date them.

Court: You can put the date of the order on if they haven't been received.

The following buildings are situated on the land covered by the lease: the house and barn, two barns, a storage shed and bunkhouse and garage. The house is probably an average of 50 by 20. That is the house where I am living now. I don't know how many acres of land there are. I would say approximately 8 or 10. 240 acres are included in the grazing permit less a small tract which has been withdrawn on which they are doing some air field work. We have had some difficulty, particularly the hay, in getting supplies to operate. During this past summer and fall we have not been having trouble getting help.

Q. Mr. Sheely, have you stopped making local deliveries in town except to wholesale accounts and the Army?

A. With the exception of two or three customers who are directly between the ranch and the down town district.

(Testimony of Ross L. Sheely.)

Q. Did you do so at the time I have mentioned do so due to a shortage of help?

A. There was a number of conditions. War conditions, automobile conditions, restriction of tires was perhaps the most important.

There was no discussion regarding Bang's disease with Mr. Martin at the ranch prior to purchasing it. I recall being present in your office together with my family, Mr. Martin, Mr. Cuddy and yourself, and discussing the clause in the contract of no [148] warranties and that there was a discussion regarding to my having inspected the cows, knowing their condition and that there was no guarantee on it. We were in your office. I was there and Mrs. Sheely, Jack, Joe, Mr. and Mrs. Martin, yourself and Mr. Cuddy. Mr. Cuddy said what about Bang's disease. Mr. Martin said I don't know anything about it, but he did know about it. He knew it was against the law to sell diseased cows. All he said was there was no warranty in the contract. He said there was no warranty as to the health of the cows. He did not tell me whether it was possible to determine whether they had Bang's disease. A very short time, was the period of negotiation for the purchase of these cows, not to exceed a week. As to whether I had the cows tested for Bang's disease, they weren't mine. I couldn't have them tested. No, it didn't occur to me to have them examined. I knew it was against the law to sell them. As far as possible I made an examination of them. There was no veterinarian available. Mr. Graves was not

(Testimony of Ross L. Sheely.)

available. I believe all that summer until way in August he was in Southeastern Alaska. No, I did not make any attempt to. It never entered my head that it was necessary to have a detailed examination. I didn't ask if they had tuberculosis. Those are things prohibited by law and it took me some time to find that out.

Q. How long have you been buying cattle, milk cows, for yourself or others?

A. The first bunch I bought to amount to anything was at Palmer.

Q. Have you bought any others?

A. One or two.

Q. Did you ever have them examined for disease.

A. No, sir.

Q. Never did. A. No, sir, not at my ranch.

[149]

Q. You knew that there was a City ordinance to pasteurize milk, local milk, because of Bang's disease in this locality?

A. Many years ago?

Q. No, two years ago? A. No, I don't.

Q. Didn't you know all milk in this locality had to be pasteurized because of Bang's disease?

A. Had to be pasteurized?

Q. Because of Bang's disease?

A. I didn't know that, no, I wasn't living here then.

Q. You were living at Palmer? A. Lately.

Q. When do you mean? A. 1941, no 1940.

(Testimony of Ross L. Sheely.)

Q. Since then you have been selling milk?

A. To the Co-Op at Palmer.

And upon

Redirect Examination

the witness testified as follows:

I understood the question as to the value of the cows that I had put on the dairy here in Anchorage from the dairy at Palmer as to what they were worth when brought to the dairy as dairy cows, I said \$300. Now they are worth what they are worth for meat. I can't move them. I can't take them off the place.

Recross Examination

(By Mr. Donohoe)

There are at this time 12 cows on the Step and a Half farm that were brought from Palmer, 18 cows and 1 bull were brought from Palmer. As to the dates when they were brought, I brought one cow in July, 1941. I question whether my records would tell you the approximate date. I don't have an individual record of my milking cows. No, sir, I don't keep a record of whether I milk the cows or not. we milk every day and night. No, in the [150] record where I have the names of the cows I don't have a record of where they were. I have it within thirty days. If I tell you how many were brought in July, is that satisfactory? Eight cows in July, 1941. There were four cows in September, 1941, one cow in August and I will say one in October. I am a little at loss to know when the bull was brought

(Testimony of Ross L. Sheely.)

in, I might be able to find that in some records I have at home. I brought the bull in May 19, 1942 and the last four cows were added to the herd on November 8, 1942. I don't believe I did bring down three or four cows when I brought the bull down on May 19, 1942. I believe it is correct that I brought down two cows when I brought the bull down on May 19, 1942. My other tabulation must be off two cows somewhere. The two cows were added in the count before which were taken back to Palmer which when tested did not have the disease. Two cows brought down here and milked and taken back to Palmer and tested and had not contracted the disease, they were not killed and are not here. No, these were not the two that were brought down with the bull, two other cows. I took them in the fall of 1941, or early in the winter. They were probably down here a month or so, two months at the outside, probably through July and August and early September. Three or four of the Martin herd were taken to Palmer, in the month of July, 1941, some of them, I don't believe I can tell you the number of cows specifically and the dates within a month. Five were taken up there in July and August, 1941. I couldn't say positively that I have not taken any cows to Palmer since July and August, 1941. Early in 1941 were the last cows taken to Palmer; none whatever to put in the herd up there. I haven't taken any cows to Palmer in 1942. I don't believe any whatever. No, sir, I can't recall a single one. No one else took any up for me. Some of these cows

(Testimony of Ross L. Sheely.)

were left at Palmer; two were brought back just before they freshened. Pretty and Pink were taken back here. Then two or [151] three of them were found to be re-actives and were butchered there. These two cows were brought back here early in September, 1941. I do not have any of the Sheely herd left in Palmer. No, none of the Martin herd, there wasn't a Martin cow left at Palmer prior to the fire, none at all. Yes, sir, I did have some of the Martin herd calves there.

CHARLOTTE SHEELY

one of the plaintiffs, being called as a witness, being first duly sworn, testified as follows:

My name is Charlotte Sheely. I did sign the contract which is a conditional sales agreement and lease.

Q. Covering the purchase of cattle on the Martin ranch and a lease of the property on behalf of whom were those three signatures?

Donohoe: Object as incompetent. The papers speak for themselves.

Court: She may testify. Exception allowed.

A. I signed it for the copartners, the four, Mr. Sheely, myself, Jack and Joe.

There was no cross examination.

JOHN H. SHEELY

one of the plaintiffs being called as a witness, being first duly sworn testified as follows:

My name is John H. Sheely and I am one of the plaintiffs in this action. I am not positive as to the date. It was in the latter part of June. I was a party to the agreement, being the conditional sales contract covering the purchase of cattle at the Martin ranch and lease of the property there.

Q. And in whose behalf did you sign such instrument?

Donohoe: Object to the question.

Court: Objection overruled.

Q. For whose benefit did you sign that agreement? [152]

Donohoe: Object as incompetent, the papers speak for themselves.

A. Well, I signed it on behalf of—we were planning a partnership, we were going to work it on shares.

Q. Who were the partners?

A. Mr. and Mrs. Sheely and my brother and myself.

Q. Where is your brother now?

A. En route from College, coming *hom* for the Christmas holidays.

ROSS L. SHEELY

being recalled, presented Exhibit "D" with the dates.

Upon

Cross Examination

(By Mr. Donohoe)

testified as follows:

I have prepared the dates on Exhibit "D". The heating plant, \$721.70 was purchased new. As to whether or not these items were purchased new, some were on the place and I purchased them from Mr. Martin. It was in the contract that I would take them. They were not included in the purchase price. Some materials in the barn were brought down from Palmer. I valued that by taking the labor; I hired that done and so many thousand feet of lumber, part second hand and some new. I haven't anything on the item of valuation for the lumber. There is \$33 for the barn. That is the cost price for second-hand lumber and the price of the new lumber, \$25 per thousand for the second-hand lumber. I believe the labor amounted to \$75. I gave a couple of boys a contract to build it for \$75 who had done some work for me before. Yes, all the other items on the list were new, including the lumber used in the manger and the floor—there was no lumber in the manger.

Court: The cattle killed or butchered at Palmer, were they included in the first list you gave us. You testified there were [153] 36 slaughtered, the 3

(Testimony of Ross L. Sheely.)

taken to Palmer first are they included in that number? A. Yes, sir.

Donohoe: The defendants move for a non suit on the grounds that there is insufficient facts to state a cause of action.

Court: Motion denied. Exception allowed.

Donohoe: Defendants move for a non suit on the grounds that plaintiffs have not introduced sufficient evidence to sustain their complaint.

Court: Objection overruled. Exception allowed.

Whereupon the court announced he would hear from respective counsel as to the nature of the action.

JACOB BASS

was called as a witness on behalf of the defendants and being first duly sworn testified as follows:

My name is Jacob Bass. I was employed from June 28, 1941 until May, 1942 on the Step and a Half ranch. I worked for Mr. Martin for 13 months and Sheely 11. I didn't keep track of the date when I started working for Sheely. I worked for him during a period of time he operated the ranch. I left it May 19th of this year, 1942. Yes, I was on the ranch working for Mr. Sheely from June 28, 1941 to May 19, 1942. I was taking care of the cows. Yes, while employed there cattle of Mr. Sheely's were brought to that ranch from Palmer. I can't say when it was. I never saw good calves

(Testimony of Jacob Bass.)

come from his cows yet. The first cattle came after Mr. Sheely had it about a month. Yes, I know when some of the Martin herd were taken to Palmer, it was shortly after the Sheely cows were brought down from Palmer. I think there were 52 or 53 cattle on the Step and a Half Ranch when I left in May, 1942. The milk supply was a little better than 200 gallons when Mr. Sheely first took over the Step and a Half Ranch in June, 1941. When I left it was 85 to the milking—twice [154] a day. That would be 170 gallons a day. Yes, there was a change in the feeding of those cattle, in the hay. That was hay and alfalfa hay. There is much better milk in alfalfa hay. The hay came from Matanuska. No, this is not the same type of hay this herd was getting when it was producing 200 gallons a day. That was the feed from Mr. Martin.

ASA T. MARTIN

one of the defendants called as a witness on his own behalf, being first duly sworn, testified as follows:

My name is Asa T. Martin. I reside at 1108 Fourth Avenue, City of Anchorage. I am one of the defendants in this action. Sheely has paid me \$9800 under the conditional sales agreement, Exhibit "A". That was the down payment made. He made monthly payments including December, 1941. No other payments were made after December, 1941. As to whether he made any payments to me

(Testimony of Asa T. Martin.)

for stock, he paid for the goods that were ordered as per agreement. They were coming in. Offhand I don't know the exact amount. I paid the bills and he reimbursed me. Yes, sir, I also paid \$550 on a truck. Other than those payments no other sums were paid to me by Sheely under this contract. The lease Exhibit "B" was paid up to December, 1941 only. There have been no payments since then. One year was paid on Exhibit "C", \$110 and nothing other than that. I did have a conversation with Mr. Sheely prior to his purchase of the place with reference to Bang's disease. I insisted on that being written into the contract, no warranty. Mr. Sheely asked me out behind the barn. I said I couldn't say the exact status. I said some was shown a year and a half ago and I had butchered some reactors since then and couldn't state the present status. I said I was going to vaccinate the cows in the future. He asked when we had had an abortion and I said quite a while ago and he said he considered that good. The milk production at the time of the sale was 200 gallons a day. [155] About one-sixth of the herd would normally be dry. As to the average production of milk of a herd, I will take the records of other people. I think the records will show three gallons is high, having a herd of 50 cows, that is above the average.

Upon

Cross Examination

the witness testified as follows:

This conversation with Mr. Sheely was previous

(Testimony of Asa T. Martin.)

to the time of the sale of the herd, when he was inspecting the place. It was only a few days before the purchase, a very few days before the purchase in which he talked about Bang's disease. I told him some were re-actors according to the veterinarian. Graves was the veterinarian. He didn't ask me to show it to him. Just he and I were there. No one else was there. No, he didn't ask me to tell him the gist of it. No, I didn't tell him I had the report. I had a copy. No, he didn't ask to see it. No, he didn't ask how many were infected or any details at all. Yes, I signed the answer in this case. Yes, that is my signature to the verification. Yes, sir, I think I read that over before I signed it. Well, I am not sure whether Mr. Donohoe was present or not when I read it over. Yes, sir, I read paragraph 8 of the answer before I signed the answer. Before I swore to the answer I read Mr. Sheely's complaint and that of the co-plaintiffs. I read all of it. Yes, sir, I read paragraph VIII. Well, as I interpret that paragraph, it specifically states that I was aware of the fact and Mr. Sheely was not aware of it. I can't see why Mr. Sheely wasn't—I told him all I had was the veterinarian's report. Mr. Sheely did ask me at the time I had the conversation about previous abortion of the herd. All I bought were tested before they left the states. I was adding to my herd right along. I did not bring those in to replace cows I slaughtered. I did butcher aborted cows. I think there were three young calves on my place when he took over. [156] There was one

(Testimony of Asa T. Martin.)

cow which had a sore foot which I gave to Sheely. Right. Mr. Sheely and I alone had the conversation in which I informed him about the herd having more or less Bang's disease. Yes, that is the only conversation I had with any of these co-partners about this.

Donohoe: Did you have another conversation in my office with Mr. Cuddy and Mr. Sheely?

Grigsby: Object he just testified it was the only one he had.

Defendants rest.

Argument.

Donohoe: They have to elect as to the cause of action, that is why I have been objecting throughout the trial.

Whereupon

ROSS L. SHEELY

one of the plaintiffs, was recalled in rebuttal and testified as follows:

I heard the testimony of Mr. Martin given in this court. No such conversation was entered into as testified by Mr. Martin at the barn on the Martin ranch in which the matter of Bang's disease in the cows was discussed.

Whereupon taking of testimony was closed.

Donohoe: I renew the motion for non suit upon the ground that the complaint does not state facts sufficient to state a cause of action.

Court: Objection overruled.

Donohoe: The same motion of not sufficient evidence to sustain the allegations of plaintiffs' complaint.

Court: Same ruling. Exception allowed.

Whereupon, respective counsel stated to the court their views as to the nature of the actions involved in this case. At this time the plaintiffs, through their counsel, stipulated that their [157] cause of action was of an equitable nature.

At this time the defendants, through their counsel, stipulated that their cause of action was of an equitable nature but would not stipulate that the plaintiffs' cause of action was of an equitable nature.

At this time, the Court discharged the Jury from further consideration of this case.

The foregoing was all of the evidence presented by the plaintiffs and the defendants in the cause, and counsel for the plaintiffs and for the defendants thereupon presented their oral arguments to the Court.

Thereafter, and on the 4th day of January, 1943 the Court did make and order entered its Findings of Fact and Conclusions of Law; to each of which the defendants excepted and exception was allowed by the Court.

And thereafter, and on the 4th day of January, 1943 the Court did sign and order entered its decree, to which the defendants excepted and the exception was allowed by the Court.

For as much as the matters and things above set forth do not fully appear of record, the said defendants A. T. Martin and Alice M. Martin tender and present as their Bill of Exceptions in said cause, and pray that the same be settled, allowed, signed and sealed and made a part of the record in said cause by this court, pursuant to law in such cases.

Dated at Anchorage, Alaska this 21st day of September, 1943.

THOMAS M. DONOHUE

JOHN E. MANDERS

Attorneys for defendants

[Endorsed]: Filed Dec. 17, 1943. [158]

[Title of District Court and Clause.]

ACKNOWLEDGMENT OF SERVICE

Receipt is hereby acknowledged of copy of Statement of Evidence and Bill of Exceptions on appeal in the above entitled action.

Dated at Anchorage, Alaska, this 21st day of September, 1943.

W. N. CUDDY

Of Attorneys for Plaintiffs.

[Endorsed]: Filed Dec. 17, 1943. [159]

[Title of District Court and Cause.]

ORDER EXTENDING TERM OF COURT FOR
PURPOSE OF PRESENTATION, SETTLE-
MENT AND ALLOWANCE OF BILL OF
EXCEPTIONS

This matter coming on for hearing this day upon the application of defendants A. T. Martin and Alice M. Martin requesting that the present term of the above entitled court be continued for the purpose of presentation, settlement and allowance of the Bill of Exceptions in the above entitled cause; it is hereby

Ordered, that the present term of the above entitled court be, and the same hereby is, extended to and including the 15th day of December, 1943 within which to present, settle and allow the Bill of Exceptions and perfect the appeal of defendants in the above entitled action.

Made and Ordered Entered at Anchorage, Alaska, this 16th day of October, 1943.

SIMON HELLENTHAL

District Judge

[Endorsed]: Filed Oct. 16, 1943. [160]

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR SETTLING
BILL OF EXCEPTIONS

This matter coming on for hearing this day upon the application of the defendants A. T. Martin and

Alice M. Martin, requesting sixty (60) days additional time to prepare present and file the record on appeal in the above-entitled cause, and to settle the bill of exceptions; it is hereby

Ordered, that the defendants have sixty (60) days additional time, to-wit, to and including the 15th day of December, 1943, within which to prepare, file, present or have approved the record and bill of exceptions in the above entitled cause.

Made and Ordered Entered at Anchorage, Alaska, this 16th day of October, 1943.

SIMON HELLENTHAL

District Judge

[Endorsed]: Filed Oct. 16, 1943. [161]

[Title of District Court and Cause.]

ACKNOWLEDGMENT OF SERVICE

Receipt is hereby acknowledged of copy of each of the following documents on appeal in the above entitled action:

1. Order Extending Time For Settling Bill Of Exceptions
2. Order Extending Term Of Court For Purpose Of Presentation, Settlement and Allowance Of Bill Of Exceptions.

Dated at Anchorage, Alaska, this 16th day of October, 1943.

W. N. CUDDY

Of Attorneys for Plaintiffs.

[Endorsed]: Filed Dec. 17, 1943. [162]

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated And Agreed by and between counsel for the plaintiffs and defendants above named, that the foregoing condensed and narrative statement of the evidence is a true and accurate statement of all the evidence introduced at the trial of the cause, and is hereby approved.

It is further stipulated and agreed that the said statement of evidence and bill of exceptions may be brought on for hearing without further notice; that an immediate hearing may be had upon upon the same, and that the same may be approved and settled as a statement of the evidence and bill of exceptions immediately without further notice.

Dated at Anchorage, Alaska, this 16th day of December, 1943.

W. N. CUDDY

Of Attorneys for Plaintiffs

JOHN E. MANDERS

Of Attorneys for Defendants

[Endorsed]: Filed Dec. 17, 1943. [163]

[Title of District Court and Cause.]

ORDER APPROVING AND CERTIFYING STATEMENT OF THE EVIDENCE AND SETTLING BILL OF EXCEPTIONS

A. T. Martin and Alice M. Martin having applied to the Court for an order approving and certifying the statement of evidence filed in this cause and

settling the same as a bill of exceptions to be used on their appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the decree entered herein on the 4th day of January, 1943; and it appearing that the plaintiffs and defendants, by and through their respective counsel, have stipulated that said statement of the evidence and bill of exceptions is a true and accurate statement of all of the evidence introduced in the trial of the cause, and having stipulated and agreed that the said statement of the evidence and bill of exceptions may be brought on for hearing without further notice, and that an immediate hearing may be had upon the same, and that the same may be approved and settled immediately without further notice; and it further appearing that said bill of exceptions contains a condensed narrative statement of the evidence in the cause, and is complete and correct; and the Court having examined the said statement of the evidence and bill of exceptions, and being fully advised in the premises, it is, therefore,

Ordered, that said statement of the evidence and bill of [164] exceptions be, and the same hereby is, approved and settled as a bill of exceptions upon the appeal of the defendants to the United States Circuit Court of Appeals for the Ninth Circuit, and

It is further ordered that this order shall be deemed and taken as a certificate of the undersigned judge of this court who presided at the hearing of the said cause and before whom all the evidence in said cause was given, that the said bill of exceptions contains a condensed statement in narrative

form of all the evidence given in said cause, including exhibits introduced by the parties, and upon which the said decree of January 4, 1943 is based.

Done by the Court and ordered entered, this 17th day of December, 1943.

SIMON HELLENTHAL

District Judge

[Endorsed]: Filed Dec. 17, 1943. [165]

[Title of District Court and Cause.]

STIPULATION IN RE PRINTING
OF RECORD

It Is Hereby Stipulated And Agreed by and between counsel for plaintiffs and defendants that in printing the record of this case upon appeal to the United States Circuit Court of Appeals for the Ninth Circuit, all captions shall be omitted after the title of the cause has once been printed and the words "title of court and cause" and the name of the paper or document shall be substituted therefor.

It Is Further Stipulated And Agreed that the conditional sales agreement, Exhibit "A", the lease, Exhibit "B", the grazing permit, Exhibit "C" and the guaranty, Exhibit "D", copies of which are attached to the complaint and various other pleadings in the action instead of being printed as exhibits to each of said pleadings need be printed only once. All other parts of the record shall be printed.

Dated this 16th day of December, 1943.

W. N. CUDDY

Of Attorneys for Plaintiffs

JOHN E. MANDERS

Of Attorneys for Defendants

[Endorsed]: Filed Dec. 17, 1943. [166]

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR SETTLING
BILL OF EXCEPTIONS

This matter coming on for hearing this day upon the application of the defendants A. T. Martin and Alice M. Martin, requesting an extension of time to and including the 1st day of February, 1944 within which to prepare, present and file the record on appeal in the above-entitled cause and to settle the Bill of Exceptions; it is hereby

Ordered, that the defendants have additional time, to-wit, to and including the 1st day of February, 1944 within which to prepare, file, present or have approved the record and Bill of Exceptions in the above entitled cause.

Made and ordered entered at Anchorage, Alaska, this 11 day of December, 1943.

SIMON HELLENTHAL

District Judge

[Endorsed]: Filed Dec. 11, 1943. [167]

[Title of District Court and Cause.]

ORDER EXTENDING TERM OF COURT FOR
PURPOSE OF PRESENTATION, SETTLE-
MENT AND ALLOWANCE OF BILL OF
EXCEPTIONS

This matter coming on for hearing this day upon the application of defendants A. T. Martin and Alice M. Martin requesting that the Special Anchorage October 1942 Term of the above entitled court be continued for the purpose of presentation, settlement and allowance of the Bill of Exceptions in the above entitled cause; it is hereby,

Ordered, that the Special Anchorage October 1942 Term of the above entitled court be, and the same hereby is, extended to and including the 1st day of February, 1944 within which to present, settle and allow the Bill of Exceptions and perfect the appeal of defendants in the above entitled action.

Made and ordered entered at Anchorage, Alaska, this 11th day of December, 1943.

SIMON HELLENTHAL

District Judge

Entered Court Journal No. G-7 Page No. 342
Dec 11 1943

[Endorsed]: Filed Dec. 11, 1943. [168]

[Title of District Court and Cause.]

ACKNOWLEDGMENT OF SERVICE

Receipt is hereby acknowledged of copy of each of the following documents on appeal in the above entitled action:

1. Order Extending Time For Settling Bill of Exceptions
2. Order Extending Term of Court For Purpose of Presentation, Settlement and Allowance of Bill of Exceptions.

Dated at Anchorage, Alaska, this 13th day of December, 1943.

W. N. CUDDY

Of Attorneys for Plaintiffs.

[Endorsed]: Filed Dec. 17, 1943. [169]

[Title of District Court and Cause.]

STIPULATION FOR PRAECIPE

To the Clerk of the District Court
For the Territory of Alaska,
Third Division.

It Is Hereby Stipulated And Agreed by and between counsel for the respective parties hereto that the record on appeal shall consist of, and that you will please make, certify and transmit to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, a true copy of each of the following indicated portions

of the record in the above entitled action as the transcript to be used on the appeal of A. T. Martin and Alice M. Martin, defendants, from the decree rendered herein on the 4th day of January, 1943, to-wit:

- (1) Complaint
- (2) Demurrer
- (3) Minute Order Overruling Demurrer
- (4) Answer
- (5) Motion and Order to Amend Complaint
- (6) Minute Order Granting Leave to Move
Against Certain Papers
- (7) Amended Complaint
- (8) Reply [170]
- (9) Motion to Strike Amended Complaint
- (10) Minute Order Denying Motion to Strike
- (11) Demurrer to Amended Complaint
- (12) Minute Order Overruling Demurrer
- (13) Minute Order Granting Defendants Leave
Plead Estoppel
- (14) That part of the Journal showing trial by
Jury December 21, 1942 which shows the
objection of defendants to the testimony
of Earl Francis Graves; and also that part
of the same Journal showing the objection
of the defendants to any evidence produced
in this case
- (15) Findings of Fact and Conclusions of Law
- (16) Decree
- (17) Motion for New Trial

- (18) Minute Order Overruling Motion for New Trial, dated June 3, 1943
- (19) Petition for Appeal
- (20) Assignment of Errors
- (21) Order Allowing Appeal
- (22) Citation on Appeal
- (23) Bond on Appeal
- (24) Acknowledgment of Service of Appeal Papers
- (25) Order Extending Time for Settling Bill of Exceptions
- (26) Statement of Evidence and Bill of Exceptions
- (27) Acknowledgment of Service
- (28) Order Extending Term of Court for purpose of Presentation, Settlement and Allowance of Bill of Exceptions
- (29) Order Extending Time for Settling Bill of Exceptions
- (30) Acknowledgment of Service
- (31) Stipulation in re Statement of Evidence and Bill of Exceptions
- (32) Order Approving and Certifying Statement of Evidence and Settling Bill of Exceptions
[171]
- (33) Stipulation in re Printing of Record
- (34) Order Extending Time for Settling Bill of Exceptions
- (35) Order Extending Term of Court for Purpose of Presentation, Settlement and Allowance of Bill of Exceptions
- (36) Acknowledgment of Service

- (37) This Stipulation for Praecipe
- (38) Praecipe for Transcript on Appeal from Judgment
- (39) Clerk's Certificate

It is further stipulated and agreed that such additional portions of the record as may be required by either plaintiffs or defendants may be certified and transmitted.

Dated this 16th day of December, 1943.

W. N. CUDDY

Of Attorneys for Plaintiffs

JOHN E. MANDERS

Of Attorneys for Defendants

[Endorsed]: Filed Dec. 17, 1943. [172]

[Title of District Court and Cause.]

PRAECIPE FOR TRANSCRIPT ON APPEAL
FROM JUDGMENT

To the Clerk of the District Court
For the Territory of Alaska
Third Judicial Division

You are hereby requested, in transmitting a true copy of the record of the District Court for the Territory of Alaska, Third Division, in the above entitled cause pursuant to the appeal of the defendants and appellants from the judgment entered on the 4th day of January, 1943, to incorporate into the transcript of record on such appeal the following portions of the record in said cause in your office, to-wit:

- (1) Complaint
- (2) Demurrer
- (3) Minute Order Overruling Demurrer
- (4) Answer
- (5) Motion and Order to Amend Complaint
- (6) Minute Order Granting Leave to Move
against Certain Papers
- (7) Amended Complaint
- (8) Reply
- (9) Motion to Strike Amended Complaint
- (10) Minute Order Denying Motion to Strike
- (11) Demurrer to Amended Complaint [173]
- (12) Minute Order Overruling Demurrer
- (13) Minute Order Granting Defendants Leave
to Plead Estoppel

(14) That part of the Journal showing trial by Jury December 21, 1942 which shows the objection of defendants to the testimony of Earl Francis Graves; and also that part of the same Journal showing the objection of the defendants to any evidence produced in this case

- (15) Findings of Fact and Conclusions of Law
- (16) Decree
- (17) Motion for New Trial
- (18) Minute Order Overruling Motion for New
Trial, dated June 3, 1943.
- (19) Petition for Appeal
- (20) Assignment of Errors
- (21) Order Allowing Appeal
- (22) Citation on Appeal
- (23) Bond on Appeal

(24) Acknowledgment of Service on Appeal Papers

(25) Order Extending Time for Settling Bill of Exceptions

(26) Statement of Evidence and Bill of Exceptions

(27) Acknowledgment of Service

(28) Order Extending Term of Court for purpose of presentation, settlement and allowance of Bill of Exceptions

(29) Order Extending Time for Settling Bill of Exceptions

(30) Acknowledgment of Service

(31) Stipulation in re Statement of Evidence and Bill of Exceptions

(32) Order Approving and Certifying Statement of Evidence and Settling Bill of Exceptions

(33) Stipulation in re Printing of Record

(34) Order Extending Time for Settling Bill of Exceptions [174]

(35) Order Extending Term of Court for Purpose of Presentation, Settlement and Allowance of Bill of Exceptions

(36) Acknowledgment of Service

(37) Stipulation for Praecipe

(38) This Praecipe for Transcript on Appeal from Judgment

(39) Clerk's Certificate

Dated, this 16th day of December, 1943.

THOMAS M. DONOHOE and
JOHN E. MANDERS

Attorneys for defendants and
appellants.

Receipt of a copy of the foregoing Praecipe is
hereby acknowledged this 16th day of December,
1943.

W. N. CUDDY

of Attorneys for Plaintiffs

[Endorsed]: Filed Dec. 17, 1943. [175]

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD

United States of America,
Territory of Alaska,
Third Division—ss.

I, M. E. S. Brunelle, Clerk of the District Court
for the Territory of Alaska, Third Division, do
hereby certify that the foregoing and hereto an-
nexed 175 pages, numbered from 1 to 175, inclusive,
are a full, true and correct transcript of the records
and files of the proceedings in the above entitled
cause, made in accordance with the praecipe filed
in my office on the 17th day of December, 1943, as
the same appears on the records and files in my
office; that the foregoing transcript has been pre-
pared, examined and certified to by me, and that
the costs thereof, amounting to \$26.50, has been

paid to me by John E. Manders, of counsel for the appellants herein.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court this 11th day of January, 1944.

[Seal]

M. E. S. BRUNELLE

Clerk of the District Court,
Territory of Alaska, Third
Division.

[Endorsed]: No. 10665. United States Circuit Court of Appeals for the Ninth Circuit. A. T. Martin and Alice M. Martin, Appellants, vs. Charlotte L. Sheely, John H. Sheely, Joe A. Sheely and Ross L. Sheely, Copartners, Appellees. Transcript of Record. Upon Appeal from the District Court for the Territory of Alaska, Third Division.

Filed January 19, 1944.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.